SUPREME COURT OF THE UNITED STATES.

October Term, 1904.
No. 460.

HIRAM REMINGTON,
Plaintiff in Error,
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the Circuit Court of the United States for the Northern District of New York, allowed under Section 5 of the act of March 3, 1891, Chapter 517, for the purpose of reviewing the question of the jurisdiction of the Court below, which is the only question in issue in the case.

For the purpose of having the case advanced under Rule 32, the plaintiff in error, in accordance with the rule, submits this brief to the consideration of the Court, without oral argument, as prescribed in Rule 6, in regard to motions to dismiss writs of error and appeals. The reason for thus expediting the case and waiving the benefit of an oral argument is that the plaintiff in error is nearly

89 years of age and infirm. The case has been delayed nearly two years by preliminary proceedings.

The action was brought by the plaintiff in error in the Supreme Court of the State of New York. After making a motion in the State Court to set aside the service of the summons, and after the entry of an order by the State Court denying such motion, the defendant filed in the State Court a petition for the removal of the suit to the Circuit Court of the United States for the Northern District of New York on the ground of diverse citizenship. After the filing of the record on removal in the Circuit Court of the United States, the defendant made another motion to set aside the service of the summons on affidavits similar to those used in the State Court. The plaintiff moved to remand the suit to the State Court on grounds hereinafter stated. The two motions were heard at the same time; the Court denied the motion to remand, granted the motion to set aside the service of the summons and rendered judgment dismissing the action for want of jurisdiction of the defendant.

STEPS TAKEN IN THE CASE.

1. On the 10th day of April, 1903, the summons in the action, without the complaint, with the venue laid in Jefferson County, New York, was personally served upon the defendant by the delivery of a copy of the same to one J. C. Stubbs, a director of the defendant, in the State of New York. This summons was in the form prescribed by sections 417 and 418 of the Code of Civil Procedure of the State of New York, required the service of the defendant's answer on plaintiff's attorneys within

twenty days after service of the summons, exclusive of the day of service, and contained the following: "In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint." (Printed Record, p. 70.)

2. On the 22nd day of April, 1903, the defendant's attorneys obtained from the plaintiff's attorneys the following stipulation signed by them, to wit: "Stipulated that the defendant may have twenty days additional time in which to appear generally or specially herein, or for the purpose of moving to vacate the service of the summons in this action." (Printed Record, p. 72.) This stipulation was filed in the office of the county clerk of Jefferson County, on the 18th day of November, 1903, after the record on removal had been transmitted to the Court below, and a copy of said stipulation was transmitted to the Court below in a supplemental record on removal, filed November 19, 1903. (Printed Record, p. 73.)

3. On May 11, 1903, the defendant's attorneys served upon the plaintiff's attorneys a notice that they appeared in the action for the purpose only of making a motion therein to set aside the service of the summons therein on the defendant. (Printed Record, p. 70.)

4. On May 11, 1903, the defendant's attorneys served on the plaintiff's attorneys a notice of a motion, to be heard at a Special Term of the said State Court on May 16, 1903, "for an order setting aside the service of the summons herein, on the ground that such service was irregular, defective, null and void and of no effect; or for such other or further order as may be proper, with costs of motion."

(Printed Record, p. 69.) This motion was made upon an affidavit of said J. C. Stubbs, stating that he was a resident of the city of Chicago, Illinois, and was not a resident of the State of New York when the summons was served; that on the 10th day of April, 1903, a copy of said summons was served upon him while he was in the city of New York for a few days upon business in no way connected with the business of the defendant; that at the time of such service he was a director of the defendant; that the defendant is a corporation organized under the laws of the State of California, and it does no business whatever in the State of New York and has no property within said state; and that, if a cause of action exists in favor of the plaintiff against the defendant, he did not believe that it arose within the State of New York. (Printed Record, p. 68.)

5. The hearing of this motion was continued by stipulation to a Special Term, held May 25, 1903. (Printed Record, p. 30.)

6. On the 23rd day of May, 1903, the defendant's attorneys procured from the plaintiff's attorneys the following stipulation, signed by them, to wit: "The defendant may have ten days time after the hearing and decision of the motion herein to appear generally in case the said motion be decided in favor of the plaintiff. This stipulation shall in no way affect any of plaintiff's rights on account of any prior appearance herein, or be deemed a waiver of any of plaintiff's rights herein." (Printed Record, p. 72.) This stipulation was filed in the office of the county clerk of Jefferson County on the 18th day of November, 1903, after the record on removal had been transmitted to the Court below, and a

copy of said stipulation was transmitted to the Court below in a supplemental record on removal filed November 19, 1903. (Printed Record, p. 73.)

7. The motion was not heard at the special term held May 25, 1903, the justice who held the term declining to hear the same for the reason that he had acted as counsel for the plaintiff previous to his election. (Printed Record, p. 30.)

8. The hearing of said motion was then fixed by agreement for a special term held June 9, 1903. (Printed Record, p. 30.) At that time the defendant's attorneys made the motion and presented the moving papers, and were heard in support of said motion, and the plaintiff's attorneys presented certain affidavits in opposition thereto, and were heard in opposition thereto. Thereupon the attorneys of the defendant asked that defendant be permitted to serve additional affidavits in support of said motion, and the Court "ordered that the defendant may serve additional affidavits on plaintiff's attorneys on or before July 1, 1903, and that said motion be postponed and heard at a special term to be held by Mr. Justice Andrews at Syracuse, N. Y., July 11, 1903." (Printed Record, pp. 30 and 46.)

9. The motion was not heard on July 11, 1903, on account of the illness of one of defendant's attorneys, but on the 24th day of August, 1903, the plaintiff's attorneys and the defendant's attorneys signed a stipulation which, after reciting the various adjournments of said motion, continued as follows: "and it is desired that said motion, and all papers in connection therewith, should be submitted to Hon. William S. Andrews, Justice of the Supreme Court, for his decision;

"It is now hereby stipulated that said motion

and all papers in connection therewith be submitted to said justice, as of the special term heretofore appointed to be held at the court house in the city of Syracuse, N. Y., on the 11th day of July, 1903, with the same force and effect as if said motion papers had been submitted at said special term." (Printed Record, p. 30.)

10. On this motion, the defendant submitted four affidavits, one being that of J. C. Stubbs, hereinbefore mentioned, and one that of Mr. Maxwell Evarts, counsel for the defendant. Mr. Evarts, among other things, denied in this affidavit that the defendant had had any property of any kind whatever in the State of New York since the 29th day of July, 1899, and averred that since that date the defendant had not done or transacted any business within said state. (Printed Record, pp. 35 and 36.) In opposition to said motion, the plaintiff presented twelve affidavits and a certificate of the Secretary of State of the State of New York. (Printed Record, p. 29.) In one of said affidavits, verified May 16, 1903, and presumably read in court June 9, 1903, made by one of plaintiff's counsel, it was shown that the amount involved in the action was large. (Printed Record, p. 64.)

11. On the 28th day of September, 1903, the State Court, by Mr. Justice Andrews, made an order denying the defendant's motion to set aside the service of the summons, with ten dollars costs to the plaintiff. (Printed Record, p. 29.) This order was entered in Jefferson County Clerk's Office on October 2, 1903, and on the same day a copy thereof, with notice of such entry, was served on defendant's attorneys. (Printed Record, pp. 71 and 102.)

12. On the 15th day of October, 1903, the de-

fendant's attorneys served on plaintiff's attorneys, and filed in the office of the county clerk of Jefferson County, notice of appeal to the Appellate Division of the Supreme Court, Fourth Department, from said order dated September 28, and entered October 2, 1903, denying defendant's motion to set aside the service of the summons. (Printed Record, pp. 26, 28, 71 and 102.)

13. On the 16th day of October, 1903, the defendant's attorneys served upon the plaintiff's attorneys an affidavit made by Mr. Thomas Burns, one of the defendant's attorneys, verified October 16, 1903, in which, among other things, he said:

> "That on October 15, 1903, the defendant, through its said attorneys, appearing specially as aforesaid, served and filed a notice of appeal from said order (entered October 2, 1903) to the Appellate Division of this court, Fourth Department, and has duly perfected said appeal from said order, and intends in good faith to prosecute the same, and that defendant will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal, as plaintiff might make application to this Court for judgment herein." (Printed Record, p. 26.)

With the said affidavit, the defendant's attorneys served on plaintiff's attorneys a notice that upon said affidavit and upon all papers theretofore served or filed they would move the Court at a special term to be held at Syracuse on the 24th day of October, 1903, for an order staying all proceedings on the part of the plaintiff under said order entered October 2, 1903, until the decision of said appeal, "or for such other relief as may be just." (Printed Record, pp. 25 and 102.)

14. On the 16th day of October, 1903, the plain-

tiff made an affidavit in said action for the purpose of procuring an order for the taking of his examination by deposition. In this affidavit the plaintiff, among other things, said that no appearance had been made by the defendant except the appearance hereinbefore mentioned, and:

> "That the complaint in said action has been prepared and verified by the plaintiff, but has not been served upon the defendant or its attorneys, for the reason that no demand for said complaint has been made by or on behalf of said defendant. That no answer has been served in said action. That the nature of said action and the substance of said plaintiff's cause of action are as follows: That this action is brought for the purpose of recovering damages from the defendant, Central Pacific Railroad Company, amounting to $414,492.64 and interest thereon from the 10th day of April, 1903, besides the costs and disbursements of this action, which damages arise out of the following facts." (Stating the facts somewhat in detail.) * * * "That the judgment demanded in this action is for the recovery from the defendant of the sum of $414,492.64, with interest thereon from the 10th day of April, 1903, and the costs and disbursements of this action." (Printed Record, pp. 9 and 14.)

15. On the 19th day of October, 1903, the plaintiff's attorneys presented said plaintiff's affidavit and certain other affidavits to the county judge of Jefferson County, N. Y., and obtained from him thereon an order for the taking of plaintiff's examination by deposition in said action on the 2nd day of November, 1903, and on October 19, 1903, said affidavits were filed and said order entered in the office of the county clerk of Jefferson County, N. Y. (Printed Record, pp. 7, 71, 102.)

16. On the 22nd day of October, 1903, the de-

fendant's attorneys had learned that the amount sought to be recovered by the plaintiff in said action exceeded the sum of $2,000, exclusive of interest and costs, and on that day procured the execution of the bond for the purpose of procuring the removal of said action to the Circuit Court of the United States. (Printed Record, pp. 4, 102.)

17. On the 23rd day of October, 1903, said order for the taking of plaintiff's deposition and the affidavits on which it was granted, including said affidavit of the plaintiff, verified October 16, 1903, were served upon defendant's attorneys. (Printed Record, p. 102.)

18. On the 24th day of October, 1903, the motion of defendant's attorneys for a stay was, in accordance with the notice served by them as stated, submitted to said State Court at a special term held at Syracuse, N. Y., and the defendant's attorneys then presented said affidavit of Thomas Burns, verified October 16, 1903, to the Court in support of said motion, and were heard by the Court in support thereof, and the plaintiff's attorneys presented the affidavit of Mr. Frederick H. Remington in opposition to said motion, and were heard in opposition thereto, and thereupon the Court made an order which, after reciting the making of the order, entered October 2, 1903, denying the motion made by the defendant to set aside the service of the summons, the appeal therefrom taken by the defendant to the Appellate Division of the court, the reading and filing of said affidavit of Thomas Burns, the notice of the motion and the said affidavit of Frederick H. Remington, and the hearing of the attorneys for the respective parties, proceeded as follows:

"Ordered, that the defendant be relieved from any default in appearing herein and that all proceedings on the part of the plaintiff be stayed, pending said appeal and until ten days after the decision thereof, except that this order shall not stay the order for the examination of the plaintiff herein, granted by Hon. E. C. Emerson, County Judge of Jefferson County, and entered in said clerk's office October 19, 1903.

"Let the papers upon which this motion was made be filed and this order entered in Jefferson County."

Enter

W. S. A., J. S. C."

Approved

P. W. & B.

B. C. & H." (Printed Record, p. 24.)

The date of this order is given in the caption thereof as October 24, 1903. The initials after the word "approved" are the initials of the attorneys for the respective parties.

The affidavit of Mr. Frederick H. Remington, mentioned in said order, showed that it was very important to the plaintiff and would be very important to his personal representatives, in case of his death before the trial of the action, to have his deposition taken on November 2, 1903, in accordance with the order granted therefor by the county judge, to preserve plaintiff's testimony. It appeared from this affidavit that the plaintiff was then 87 years of age, infirm in health, and that he was the only witness to certain facts, without proof of which it would be impossible for the plaintiff or for his personal representatives, in case of his death before the trial of the action, and their substitution in the action as plaintiffs, to recover in the action. (Printed Record, pp. 26 and 27.)

19. On October 26, 1903, the said order staying proceedings and the affidavits mentioned therein were filed and said order entered in the office of the county clerk of Jefferson County. (Printed Record, pp. 71, 102.)

20. On October 26, 1903, the petition of the defendant for the removal of the suit to the Circuit Court of the United States for the Northern District of New York, on the ground of diverse citizenship, was made and verified, and it and said bond on removal, dated October 22, 1903, were presented to a justice of said State Court at Chambers. Said justice thereupon endorsed upon said petition: "Read on application, October 26, 1903. W. M. R., J. S. C." (Printed Record, pp. 2 and 3), and endorsed upon said bond: "I hereby approve of the within bond as to form and sufficiency of surety. Dated October 26, 1903, Watson M. Rogers, J. S. C." (Printed Record, p. 6.) On the same day, this petition and bond were filed in the office of the county clerk of Jefferson County, N. Y. (Printed Record, pp. 72-102.) The said petition and bond were never presented to the State Court in session, and no order relating thereto or for the removal of said cause to the Circuit Court of the United States was obtained from the State Court. (Printed Record, pp. 71-97-98-102.) This petition (omitting the title, prayer, signature and verification) reads as follows:

> *"To the Honorable The Supreme Court of the State of New York:*
>
> The petition of the Central Pacific Railroad Company, appearing specially and for the sole and single purpose of presenting this petition, respectfully showeth:
>
> That heretofore and on or about the 10th

day of April, 1903, the above entitled suit, which is a suit of a civil nature, was brought in this court by Hiram Remington against your petitioner as defendant. That your petitioner, at the time of the commencement of said suit, was and has ever since been and still is a foreign corporation, organized and created under the laws of the State of California, and at all such times was and still is a citizen and resident of the State of California, and a non-resident of the State of New York. That the plaintiff at the time of the commencement of said suit was and has ever since been and still is a citizen and resident of the State of New York. That said suit is a suit of a civil nature in which there is a controversy between citizens of different states, and that the matter in dispute in such suit exceeds, exclusive of interest and costs, the sum of $2,000.

That said suit is pending undetermined in this court; and that the time has not yet arrived at which the defendant is required by the laws of the State of New York, or the rules of the Supreme Court of the State of New York, in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, and that no application has been made to any court or judge for the order to be applied for upon this petition." (Printed Record, p. 2.)

21. On November 4, 1903, the record on removal in said cause, certified by the county clerk of Jefferson County, was filed in the office of the clerk of the Circuit Court of the United States for the Northern District of New York (Printed Record, p. 72), and on the 19th day of November, 1903, a supplemental record on removal was filed, containing two stipulations. (Printed Record, p. 73.)

22. On the 5th day of November, 1903, the defendant obtained from Hon. George W. Ray, U. S. District Judge, upon an affidavit of said J. C.

Stubbs, verified October 30, 1903, an order requiring the plaintiff or his attorneys to show cause before the Circuit Court of the United States for the Northern District of New York, on the 10th day of November, 1903, at one o'clock P. M., why the service of the summons in the action should not be set aside. This order also contained the following:

> "Ordered, that the time of the defendant to enter a general appearance in this suit be and the same is hereby extended until twenty days after the final determination of the motion arising upon this order to show cause." (Printed Record, pp. 73 and 74.)

The order made by the State Court denying defendant's motion to set aside the service of the summons had not been set aside or reversed, but remained, and still remains, in full force and effect. Said order of the State Court did not contain any leave to the defendant to renew its motion to set aside the service of the summons, and no leave to renew said motion has been granted either by the State Court or by the Circuit Court of the United States.

The affidavit of J. C. Stubbs, upon which this order to show cause was made, states in substance that he resides and has an office in the city of Chicago, Illinois, and was not, at the date of the affidavit or at the date of the service of said summons upon him, a resident of the State of New York; that on the 10th day of April, 1903, a copy of the summons in this suit was served upon him while he was in the city of New York for a few days upon business in no way connected with the business of the defendant; that he was a director of the defendant company at the time of such service; that the defendant is a corporation organized under the laws

of the State of California and, at the time of the service of said summons upon him, did no business whatever in the State of New York and had no property or office within said state; and that on the 29th day of July, 1899, the defendant transferred all its property and franchises to the Central Pacific Railway Company, a corporation of the State of Utah, and since that date has done no business and has had no property in the State of New York. (Printed Record, pp. 74-94.)

This affidavit and the order to show cause were served upon the plaintiff's attorneys on the 6th day of November, 1903. (Printed Record, p. 95.)

On the 25th day of November, 1903, Mr. Maxwell Evarts verified an affidavit, which was filed and presented to the Court in support of said order to show cause. In this affidavit Mr. Evarts said in substance that the defendant had done no business of any kind in the State of New York since July 29, 1899; that since that date it has had no office in the State of New York for the transaction of business and no property therein; that on July 29, 1899, the defendant transferred to the Central Pacific Railway Company all its property, by an indenture and agreement, a copy of which was attached to the affidavit and marked "Exhibit A." (Printed Record, p. 103.) It will be noted that these affidavits of Mr. Stubbs and Mr. Evarts are substantially the same as the affidavits of the same persons, made in support of the motion to set aside the service of the summons in the State Court. Both these affidavits in the United States Court will be found in the bill of exceptions (Printed Record, pp. 94, 103), and the affidavits of the same persons in the Record on

Removal, certified by the county clerk of Jefferson County. (Printed Record, pp. 35, 36-68.)

23. On the 10th day of November, 1903, and before the hearing of said order to show cause, the plaintiff's attorneys filed written objections to the hearing, consideration or decision by the Court of said motion or order to show cause why the service of the summons in said action should not be set aside for the following reasons, to wit:

> "1st. Because said defendant did not, as by law required, make and file a petition in said action in the State Court for the removal of said suit into this court (the court below) at or before the time the defendant was required by the laws of the State of New York or by the rules of the Supreme Court of New York to answer or plead to the complaint or declaration of the plaintiff.
>
> 2nd. Because this Court (the court below) has no jurisdiction to hear, consider or decide said motion or order to show cause or to do anything in said action except to remand the same to the State Court.
>
> 3rd. Because no such bond as is required by law accompanied the said petition or was filed.
>
> 4th. Because the said petition for removal was and is insufficient in law and according to the statute and practice." (Bill of Exceptions, Printed Record, pp. 96, 97.)

In addition to said written objections, it was also urged, upon the hearing of said order to show cause why the service of the summons should not be set aside, by the plaintiff's counsel and in the briefs of plaintiff's counsel in opposition to said motion, that said Circuit Court of the United States could not review and could not set aside the order made in the State Court in said action on the 28th day of September, 1903, and entered October 2, 1903,

denying the defendant's motion to set aside the service of said summons, and that said order was an adjudication that was binding on said Circuit Court. (Bill of Exceptions, Printed Record, p. 97.)

24. After the filing of said objections and before the hearing of said order to show cause, the plaintiff's attorneys served upon the defendant's attorneys, and duly filed in said Circuit Court of the United States, a motion in writing to remand said cause to the Supreme Court of the State of New York, in and for Jefferson County, on the following grounds:

> "1. The defendant waived and is estopped from asserting any right it may have had to remove said cause from the said State Court to the Circuit Court of the United States in and for the Northern District of New York by reason of the fact that the defendant procured an order from said State Court in said action on the 24th day of October, 1903, and caused the same to be entered in the office of the clerk of said State Court on the 26th day of October, 1903, which order stayed all proceedings on the part of the plaintiff in said action pending the appeal which had been taken by the defendant to the Appellate Division of the Supreme Court, Fourth Department, in the State of New York, from an order made in said action by the Supreme Court of the State of New York, and entered on the 2nd day of October, 1903, denying a motion made by said defendant to set aside the service of the summons in said action and until ten days after the decision of said appeal, 'except that this order shall not stay the order for the examination of the plaintiff herein, granted by Hon. E. C. Emerson, county judge of Jefferson County, and entered in said clerk's office October 19, 1903,' which said order procured by the defendant, dated October 24, 1903, was made upon an affidavit of Thomas Burns, one of the defendant's attor-

neys in said action, made on the 16th day of October, 1903, which contained the following: 'that on the 2nd day of October, 1903, an order was entered in this action at a special term of this court, denying a motion made by the defendant, appearing specially as aforesaid, to set aside the service of the summons herein, which was served without a complaint or notice, as deponent is informed and believes, on or about April 10th, 1903; that no complaint has been served or filed herein, as deponent is informed and believes. That on October 15, 1903, the defendant, through its said attorneys, appearing specially as aforesaid, served and filed a notice of appeal from said order to the Appellate Division of this court, Fourth Department, and has duly perfected said appeal from said order, and intends in good faith to prosecute the same, and that said defendant will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal, as plaintiff might make application to this Court for judgment herein.'

2. The petition for the removal of said cause from the Supreme Court of the State of New York to the Circuit Court of the United States, in and for the Northern District of New York, was not filed at the time, or any time before, the defendant in said cause was required by the laws of said state, or the rules of said State Court in which said suit was brought, to answer or plead to the declaration or complaint of the plaintiff in said action, but was filed a long time thereafter.

3. The said petition for removal and the bond filed therewith were not presented to the said State Court.

4. The Circuit Court of the United States, in and for the Northern District of New York, is without jurisdiction to hear and determine the cause." (Bill of Exceptions, Printed Rec ord, pp. 95-96.)

Each of said grounds was also presented to the Court by plaintiff's counsel on the argument of said motion to remand, and in the briefs of plaintiff's counsel, and was discussed by defendant's counsel in their briefs, and all of said briefs were submitted to the Court upon the hearing of said motion to remand. (Bill of Exceptions, Printed Record, p. 96.)

25. In support of said motion to remand, the plaintiff read to the Court and filed affidavits of Mr. Willard E. Saxe, special deputy clerk of said State Court, and of Mr. Francis M. Hugo and Mr. John N. Carlisle, two of plaintiff's attorneys. It appeared from the affidavits of Mr. Saxe and Mr. Hugo, that said petition and bond for removal were presented to a justice of the State Court at Chambers and not while holding any term of court. (Bill of Exceptions, Printed Record, pp. 97-98.) The affidavit of Mr. John N. Carlisle sets forth in full Rule 24 of the State Court, which rule relates to orders extending time to answer. The said affidavit then proceeds as follows:

> "That the said Rule 24 was in force at the commencement of this action, and has ever since been in force and effect; that said Rule 24 was never complied with by the defendant in this action; that no affidavit or proof was ever presented, served or filed by the defendant in this action, as provided in said Rule 24; that no notice of an application for an order for any extension of time to answer or demur was ever served by or in behalf of the defendant in said action; that no copy of any demurrer or of any answer in said action was ever served by or on behalf of the defendant therein; that the defendant's time to answer, demur or plead, or to demand a copy of the complaint in said action, has never been extended by a stipulation or order or otherwise; that the de-

fendant's time to appear in said action has not been extended by stipulation, order or otherwise, except that on the 22nd day of April, 1903, the plaintiff's attorneys gave the defendant's attorneys a stipulation giving the defendant twenty days additional time in which to appear, generally or specially, in said action, or for the purpose of moving to vacate the summons therein; and on the 23rd day of May, 1903, the plaintiff's attorneys gave the defendant's attorneys a stipulation giving the defendant ten days time after the hearing and decision of the defendant's motion to set aside the service of the summons to appear generally in case the said motion be decided in favor of the plaintiff; that this stipulation contained a provision that it should not be deemed a waiver of any of the plaintiff's rights; that the defendant in said action was in default and the plaintiff could have applied for judgment in said action between the 20th day of May and the 23rd day of May, 1903; and the defendant again became in default in said action ten days after the decision of said motion in favor of the plaintiff on the 28th day of September, 1903, said ten days expiring on the 8th day of October, 1903; that from the said 8th day of October, 1903, until the filing of the petition and bond for the removal of this action to the Circuit Court of the United States, for the Northern District of New York, on the 26th day of October, 1903, the defendant was in default in said action and the plaintiff could have applied to the Court for judgment in said action, except that on the 24th day of October, 1903, the Court granted a stay of proceedings which had the effect to prevent such application for judgment until ten days after the decision of the appeal taken by the defendant in said action; that the defendant was in default at the time of filing the petition and bond for removal of said motion (action) to this Court." (Bill of Exceptions, Printed Record, p. 100.)

In support of said motion to remand and in opposition to said order to show cause, the plaintiff's attorneys also read the record on removal, certified by the clerk of the State Court. (Printed Record, p. 101-104.)

26. In opposition to the motion to remand the suit to said State Court, the defendant's counsel read to the Court and filed the affidavit of Mr. Henry Purcell, one of defendant's attorneys, which after reciting certain steps in said action, which appeared in the record on removal, contained the following:

> "Deponent further says, that on June 25, he was suddenly taken ill, left his office, and on account of his illness did not return to it and was not able to return to it until October 15, 1903. That on Sept. 28, Justice Andrews denied defendant's motion to vacate the service of said summons and his order thereon was entered in Jefferson County clerk's office Oct. 2, and a copy thereof with notice of such entry was on the day last mentioned served on deponent's said firm. That on Oct. 15, defendant filed and served notice of appeal from the order denying the said motion and on that day, deponent discovered that the defendant was in default in appearing. That this was due entirely to deponent's illness. That on Oct. 16, defendant moved for stay of proceedings pending the appeal taken from the said order and upon said motion coming on on Oct. 24, an order was made staying all proceedings on the part of the plaintiff, with the exception of the examination of the plaintiff before trial until ten days after the decision of the said appeal and relieving defendant from any default in appearing that then existed. This order was approved by the plaintiff's attorneys in writing upon the face thereof, was made on a Saturday at Syracuse, New York, and was entered in Jefferson County Clerk's office Monday,

Oct. 26, 1903, which was as soon as it could be entered after it was made. That on the same day, Oct. 26, deponent, on behalf of the defendant, presented its petition and bond for removal of this cause to the United States Circuit Court for the Northern District of New York to Mr. Justice Rogers, a Judge of the Supreme Court of this state, who received the said petition and approved of said bond and the same with said petition was thereupon filed in said clerk's office on the same day, to wit, October 26, 1903.

Deponent further says that on or about October 19, 1903, the plaintiff applied *ex parte* upon the affidavits of the plaintiff, Hiram Remington, and others, to the County Judge of Jefferson County for an order to examine the said plaintiff before trial which was granted on that day by said Judge, and thereafter and on October 23, 1903, copies of said affidavits and order were served on deponent's firm. That it was on the day last mentioned, to-wit, October 23, 1903, that it appeared for the first time from the papers or record in this action that the amount involved therein was two thousand dollars, exclusive of interest and costs, and this was shown and appears by a statement in the said last mentioned affidavit of Hiram Remington when he states in substance that the action was brought to recover $414,492.64.

That the case thereupon became a removable controversy and deponent as soon as possible thereafter made application for its removal. This deponent further states that he was advised informally on October 22, 1903, but not by the record herein, that the case would probably involve more than two thousand dollars and then out of abundant precaution obtained the bond on removal so as to be prepared to remove the action in case it became of record a removable one.

Deponent further says, that no complaint herein has been filed to his knowledge in the

clerk's office of Jefferson County nor has any been served upon him or his firm." (Bill of Exceptions, Printed Record, pp. 101-102.)

27. The said motion to remand said cause to the State Court, and said order to show cause why the service of the summons should not be set aside, came on for hearing and argument at the same time, at a stated term of said Circuit Court of the United States before Hon. Geo. W. Ray, District Judge. (Printed Record, p. 104.)

On the 23rd day of July, 1904, the Court below made an order at a stated term, denying said motion to remand, and on the same day, made an order granting defendant's said motion (arising on said order to show cause) to set aside the service of the summons and setting aside the said summons and the service thereof and declaring the same to be null and void and of no effect. Each of said orders was filed and entered on the 25th day of July, 1904. (Printed Record, pp. 76-77 and 104.)

No opinion was written by the Court below. (Printed Record, p. 105.)

28. On the 12th day of August, 1904, during the same term of court, at which said two orders were made and entered, the plaintiff duly filed his exceptions to each of said orders, which exceptions were signed by plaintiff's attorneys, were allowed by the Court and are set forth in the bill of exceptions. (Printed Record, pp. 104-105.) The following recital appears in the judgment: "And the plaintiff having duly excepted to each of said two decisions and orders, which exceptions are allowed by the Court." (Printed Record, p. 79.)

29. On the 23rd day of August, 1904, during the same term of court at which said orders were

made and entered, the Court below rendered its judgment, signed by Judge Ray, dismissing the action for want of jurisdiction of the defendant, which judgment was entered August 30, 1904. (Printed Record, pp. 78-79-105.) This judgment recites that the plaintiff duly made a motion in the said Circuit Court of the United States to remand said cause to the State Court on the following grounds, to-wit: (1) that the defendant had waived and was estopped from asserting any right it may have had to remove said cause to said Circuit Court of the United States by reason of certain proceedings taken by the defendant in said State Court and specified in said motion; (2) that the petition for the removal of said cause from said State Court to said Circuit Court was not filed at the time or at any time before the defendant was required by the laws of said State or the rules of said State Court in which said suit was brought to answer or plead to the declaration or complaint of the plaintiff in said action, but was filed a long time thereafter and too late to effect a removal of this suit to said Circuit Court; (3) that said petition for removal and the bond filed therewith were not presented to the said State Court in session; and (4) that said Circuit Court is without jurisdiction to hear and determine the cause.

Said judgment also recites the defendant's motion or order to show cause why the service of the summons on the defendant should not be set aside and that the plaintiff duly objected to the hearing, consideration or decision by said Circuit Court of the United States of said motion or order to show cause, on the above grounds and also on the ground that said Circuit Court had no jurisdiction to hear,

consider or decide said motion or order to show cause or do anything in this action except to remand the same to the State Court; and that the plaintiff also urged, upon the argument of the last mentioned motion, that the order made by said State Court denying defendant's motion to set aside the said service of said summons on the defendant, was an adjudication that was binding on said Circuit Court and could not be reviewed by said Court.

This judgment also recites the orders made by said Circuit Court denying plaintiff's motion to remand and granting the defendant's motion to set aside the service of said summons, and that the plaintiff had duly excepted to each of said two decisions and orders "which exceptions are allowed by the Court." (Printed Record, pp. 78-79.)

30. On the 16th day of September, 1904, during the same term of court at which said two orders were made and entered and said judgment was rendered and entered, the bill of exceptions in said case was settled, allowed, signed, certified and made a part of the record in said cause, by Hon. Geo. W. Ray, the Judge of said Circuit Court before whom all the proceedings in said cause in said Circuit Court were had. Said bill of exceptions shows, among other things, the questions concerning the jurisdiction of the Court and the said orders and judgment rendered by the Court below. The certificate to said bill of exceptions signed by said Judge, among other things, contains the following:

> "And I hereby certify that said bill of exceptions contains all the proceedings had in this court in said cause and all the evidence and proofs produced in said proceedings, and I further certify that the jurisdiction of the Court is in issue in said case and is the only

question arising in said case." (Printed Record, p. 105.)

This bill of exceptions was filed in the office of the clerk of said Circuit Court on the 20th day of September, 1904. (Printed Record, p. 105.)

31. On the 14th day of November, 1904, the plaintiff's petition for a writ of error to the Supreme Court of the United States to the end that said orders, rulings, decisions and judgment may be reviewed by said Supreme Court upon the question of the jurisdiction of the Court thereby determined, and that the errors complained of may be corrected, was presented, together with plaintiff's assignment of errors, to said Circuit Court of the United States, Judge Ray presiding. This petition stated the proceedings had in said Circuit Court and the jurisdictional question arising therein. (Printed Record, pp. 106-107.)

The assignment of errors concludes as follows:

"And the said plaintiff, Hiram Remington, prays that the orders and judgment aforesaid made and rendered by said Circuit Court of the United States may be reversed, annulled and altogether held for naught, and that this cause may be remanded to the Supreme Court of the State of New York in and for Jefferson County, and that the plaintiff may be restored to all things which he hath lost by occasion of said orders and judgment." (Printed Record, p. 111.)

32. On the 15th day of November, 1904, during the same term of court at which said two orders were made and entered, and at which said judgment was rendered and entered and said bill of exceptions was signed and filed, Hon. George W. Ray, District Judge of said District, approved the bond for said writ of error as to form and sufficiency of

sureties, and accepted the same as good and sufficient security upon the writ of error and at the same time said Circuit Court of the United States, by said District Judge, made an order allowing and awarding said writ of error. This order, among other things, recites the presentation of plaintiff's assignment of errors and petition praying for a writ of error from said judgment and orders to the Supreme Court of the United States to review said orders, judgment, rulings and decisions upon said question of jurisdiction, and that the jurisdiction of the Court is in issue in this case, and that the only question arising in said action and the only question tried and decided by the Court therein was the question of the jurisdiction of the Court, and that a bond for said writ of error in the penalty of five hundred dollars had been duly executed and had been duly approved by the Court. This order then proceeds as follows:

> "Now, on reading and filing said petition, assignment of errors and bond, and during the same term of court, at which said orders were made and entered, and said judgment was rendered and entered; and on motion of Brown, Carlisle & Hugo, plaintiff's attorneys,
>
> It is Ordered and Considered by the Court that said writ of error to the Supreme Court of the United States, from said orders and said final judgment dismissing said suit for want of jurisdiction of the defendant, be and the same is hereby allowed and awarded upon said petition of the plaintiffs, solely upon the question of the jurisdiction of the Court as prayed for in said petition, to review the question of jurisdiction of the Court in said petition mentioned, which is the only question arising herein. (Printed Record, p. 114.)

33. On the 15th day of November, 1904, the

same day the order allowing the writ of error was made and signed, the citation in this case, returnable in this court, on the 15th day of December, 1904, was signed in said Northern District of New York by Hon. Geo. W. Ray, District Judge of said district, who also signed the order made by the Court below allowing the said writ of error. (Printed Record, p. 117.)

34. On the 18th day of November, 1904, said petition for writ of error, said assignment of errors, said bond, and said order allowing the writ of error were duly filed in the office of the clerk of said Circuit Court, and said order entered, and said writ of error issued, the return day named therein being the 15th day of December, 1904. An endorsement on the original writ of error shows that on the 18th day of November, 1904, said clerk received a true copy of said writ of error for the defendant in error. (Printed Record, p. 1.)

35. On the 23rd day of November, 1904, said citation and a certified copy of said writ of error were duly and personally served upon the attorneys for the defendant, and the original citation with proof of service of the same and of said writ of error has been returned to this Court by the clerk of said Circuit Court, with his return to said writ of error. (Printed Record, p. 115.)

36. On the 12th day of December, 1904, the return to said writ of error was filed in the office of the clerk of this Court and the case was duly docketed in this Court. (Printed Record, p. 117.)

ASSIGNMENT OF ERRORS.

1. The Court erred in making the order dated July 23, 1904, and entered July 25, 1904, denying plaintiff's motion to remand this action to the Supreme Court of the State of New York in and for Jefferson County.

2. The Court erred in refusing to hold that the defendant waived any right it may have had to remove this suit from said State Court to the Circuit Court of the United States for the Northern District of New York, by obtaining from said State Court an order dated October 24, 1903, and entered October 26, 1903, staying all proceedings on the part of the plaintiff pending the appeal that had been taken by the defendant to the appellate division of said State Court from an order made by said State Court dated September 28, 1903, and entered October 2, 1903, denying a motion that had been made by the defendant in said State Court to set aside the service of the summons in this action and until ten days after the decision of said appeal, except that the order which had been granted for the examination of the plaintiff on November 2, 1903, should not be stayed.

3. The Court erred in refusing to hold that the defendant was estopped from removing this suit from said State Court to said Circuit Court of the United States, by reason of the fact that it had obtained said order staying proceedings.

4. The Court erred in refusing to hold that the defendant did not make and file in said State Court a petition for the removal of this suit from the Supreme Court of the State of New York in and for Jefferson County to said Circuit Court at the

time or at any time before the defendant was required by the laws of the State of New York, or the rule of the Supreme Court of the State of New York, in which such suit was brought to answer or plead to the declaration or complaint of the plaintiff.

5. The Court erred in refusing to hold that the petition and bond for removal were filed too late to effect a removal of said suit from said State Court to the Circuit Court of the United States for the Northern District of New York.

6. The Court erred in refusing to hold that the defendant was in default at the time said petition and bond for removal were filed in said State Court.

7. The Court erred in refusing to hold that there was no controversy between the plaintiff and the defendant in this action at the time said petition and bond for removal were filed in said State Court.

8. The Court erred in refusing to hold that it was not sufficient to present said petition and bond to a judge of said State Court at chambers.

9. The Court erred in refusing to hold that said petition and bond for removal should have been presented to said State Court in session.

10. The Court erred in refusing to hold that the said petition and bond for removal, were insufficient to effect a removal of this suit to said Circuit Court of the United States.

11. The Court erred in refusing to hold that because no order accepting said petition and bond or for the removal of said suit was made, this suit was not removed from said State Court to said Circuit Court of the United States.

12. The Court erred in granting the defendant's motion to set aside the service of the summons on the defendant in this action.

13. The Court erred in making the order dated July 23, 1904, and entered July 25, 1904, that the summons in this action and the service thereof on the defendant be and are in all respects set aside and declared to be null and void and of no effect.

14. The Court erred in rendering judgment in this action dismissing this action for want of jurisdiction of the defendant, which judgment was rendered on the 23rd day of August, 1904, and was entered on the 30th day of August, 1904.

15. The Court erred in refusing to hold that the order of said State Court, made in this action on September 28, 1903, and entered October 2, 1903, denying defendant's motion to set aside the service of the summons in this action on the defendant was an adjudication that was binding upon the defendant and upon said Circuit Court of the United States.

16. The Court erred in reviewing said order of said State Court denying defendant's motion to set aside the service of the summons in this action on the defendant.

17. The Court erred in refusing to hold that the defendant had made a general appearance in this action by obtaining from the plaintiff's attorneys on the 22nd day of April, 1903, a stipulation in writing in this action giving the defendant twenty days additional time in which to appear generally or specially in said action or for the purpose of moving to vacate the service of summons in said action.

18. The Court erred in refusing to hold that

the defendant made a general appearance in this action by serving on the plaintiff's attorneys on the 11th day of May, 1903, a notice of motion to be heard in said State Court on the 16th day of May, 1903, for an order setting aside the service of the summons in said action on the ground that such service was irregular, defective, null and void and of no effect, *or for such other or further order as may be proper with costs of motion.*

19. The Court erred in refusing to hold that the defendant made a general appearance in this action by procuring from the plaintiff's attorneys on the 23rd day of May, 1903, a stipulation in writing in this action giving the defendant ten days' time after the hearing and decision of the plaintiff's motion to set aside the service of the summons in the action, to appear generally, and providing that the said stipulation should not in any way affect any of plaintiff's rights on account of any prior appearance in said action, or be deemed a waiver of any of plaintiff's rights in said action.

20. The Court erred in refusing to hold that the defendant made a general appearance in said action by serving on the plaintiff's attorneys on the 16th day of October, 1903, a notice of motion, to be heard at a special term of said State Court on the 24th day of October, 1903, for an order staying all proceedings on the part of the plaintiff, respondent, under the order entered in said action on the 2nd day of October, 1903, until the decision of the Appellate Division of said State Court, fourth department, upon the appeal taken from said order by the defendant, appellant, *or for such other relief as may be just.*

21. The Court erred in refusing to hold that the defendant made a general appearance in said action by obtaining in said action, at a special term of said State Court, on the 24th day of October, 1903, the following order: "Ordered *that the defendant be relieved from any default in appearing herein,* and that all proceedings on the part of the plaintiff be stayed pending said appeal (the appeal that had been taken by the defendant to the Appellate Division of said State Court, Fourth Department, from the order denying defendant's motion to set aside the service of the summons in said action) and until ten days after the decision thereof, except that this order shall not stay the order for the examination of the plaintiff herein granted by Hon. E. C. Emerson, County Judge of Jefferson County, and entered in the County Clerk's office of said County October 19, 1903," and by causing said order dated October 24, 1903, to be entered in the office of the County Clerk of Jefferson County on the 26th day of October, 1903.

22. The Court erred in refusing to hold that the defendant made a general appearance in this action by obtaining from a Judge of said Circuit Court on November 5, 1903, after a copy of the record in this action was filed in said Circuit Court, an order to show cause which contained the following: "Ordered that the time of the defendant to enter a general appearance in this suit be and the same is hereby extended until twenty days after the final determination of the motion arising upon this order to show cause," and by serving said order on plaintiff's attorneys on November 6, 1903, and by filing said order in the office of the clerk of said Circuit Court.

ARGUMENT.

I.

CERTIFICATE CONCERNING THE JURISDICTIONAL QUESTION.

The judgment of the Court below, signed by the Judge before whom all the proceedings in that court were had, dismisses the action *"for want of jurisdiction of the defendant."* The judgment contains the following recitals, to-wit:

> "The above entitled cause having been commenced in the Supreme Court of the State of New York in and for Jefferson County, and removed to this court on the petition of the defendant; a copy of the record in said action in said State Court, duly certified by the County Clerk of said county under the seal of said State Court, having been filed in this court on the 4th day of November, 1903; the plaintiff having duly made a motion in this court to remand said cause to said State Court on the grounds that the defendant had waived and was estopped from asserting any right it may have had to remove said cause to this court by reason of certain proceedings taken by the defendant in said State Court and specified in said motion; that the petition for the removal of said cause from said State Court to this court was not filed at the time, or at any time before the defendant was required by the laws of said state or the rules of said State Court in which said suit was brought to answer or plead to the declaration or complaint of the plaintiff in said action, but was filed a long time thereafter and too late to effect a removal of this suit to this court; that said petition for removal and the bond filed therewith were not presented to the said State Court in session; and that this court is without jurisdiction to hear and determine the

cause; and the defendant by an order to show cause having made a motion in this court to set aside the service of the summons in this action on the defendant; and the plaintiff having duly objected to the hearing, consideration or decision by this Court of said motion or order to show cause on the above grounds, and also on the ground that this Court had no jurisdiction to hear, consider or decide said motion or order to show cause, or do anything in this action except to remand the same to the State Court; and the plaintiff having also urged upon the argument of the last mentioned motion that the order made by said State Court denying defendant's motion to set aside the said service of said summons on the defendant was an adjudication that was binding on this Court and could not be reviewed by this Court; and said two motions duly coming on for argument at the same time at a stated term of this court; and the Court having heard the counsel for the parties on said motions, and, after duly considering the same, having denied the said motion to remand and granted the said motion to set aside the service of said summons, and orders to that effect having been signed and entered at this term of Court; and the plaintiff having duly excepted to each of said two decisions and orders, which exceptions are allowed by the Court." (Printed Record, p. 78.)

The certificate to the bill of exceptions, signed by the judge, before whom all the proceedings in the Court below were had, at the same term at which said orders and judgment were rendered and entered, contains the following:

"And I hereby certify that said bill of exceptions contains all the proceedings had in this court in said cause and all the evidence and proofs produced in said proceedings, and I further certify that the jurisdiction of the Court is in issue in said case and is the only

question arising in said case." (Printed Record, p. 105.)

The bill of exceptions shows what the jurisdictional question is.

The plaintiff's petition for the writ of error first recites the commencement of the suit in the State Court, the removal thereof to the Court below, the motion made by the plaintiff to remand the same to the State Court, the defendant's motion by the order to show cause why the service of the summons on the defendant should not be set aside, the orders made by the Court on said motions, denying the plaintiff's motion and granting the defendant's motion, the exceptions of the plaintiff to said orders and the allowance of such exceptions by the Court, the judgment, rendered and entered dismissing the action for want of jurisdiction of the defendant and then proceeds as follows:

> "that in this cause the jurisdiction of the Court was and is in issue; that the only question arising herein and the only question tried and decided by this Court herein was the question of the jurisdiction of the Court; that this Court in and by said orders and judgment determined and decided in favor of the defendant and against the plaintiff in effect as follows, to wit: that said cause was properly removed from said State Court to this court; that the defendant had not waived the right to remove said cause from said State Court to this court by reason of the proceedings taken by it in said State Court; that the defendant was not estopped from removing said cause from said State Court to this court on account of proceedings taken by it in said State Court; that the petition and bond for removal were not filed in said State Court too late to effect such removal; that said petition and bond were filed in said State Court at the time or before

the time the defendant was required by the laws of the State of New York, or the rules of the Supreme Court of the State of New York, in which said suit was brought, to answer or plead to the declaration or complaint of the plaintiff; that it was not necessary to present said petition to said State Court in session, but that it was sufficient to present said petition and bond to a justice of said State Court at chambers; and that it was unnecessary to obtain any order from said State Court or a Judge thereof accepting said petition or removing said cause to this court; that the order made by said State Court on September 28, 1903, and entered October 2, 1903, denying defendant's motion to set aside the service of the summons on the defendant was not an adjudication that was binding on the defendant or on this Court; that this Court had power and jurisdiction to review said order of said State Court denying the defendant's motion to set aside the service of the summons on the defendant and make an order granting defendant's motion to set aside the service of said summons on the defendant and setting the summons and said service aside and declaring the same to be null and void and of no effect, notwithstanding said order of said State Court had not been reversed or set aside; that the service of said summons was not a legal and valid service of said summons on the defendant and said summons and said service thereof should be set aside and adjudged to be null and void and of no effect; that the defendant had not made a general appearance in the action and that the Court had no jurisdiction of the defendant;

That the plaintiff is aggrieved by the said decisions of this Court and by the judgment dismissing this action for want of jurisdiction of the defendant and by said order denying plaintiff's motion to remand this cause to said State Court and by said order granting the defendant's motion to set aside the service of

the summons on the defendant and setting aside said summons and the service thereof and declaring the same to be null and void and of no effect.

The plaintiff further says that in said order denying plaintiff's said motion to remand said suit to said State Court and in said order granting the defendant's motion to set aside the service of the summons in this action on the defendant and setting aside said summons and the service thereof on the defendant and declaring the same to be null and void and of no effect and in said judgment dismissing said action for want of jurisdiction of the defendant and in the proceedings prior thereto certain errors were committed on the question of the jurisdiction of the Court to the prejudice and great damage of this plaintiff, all of which will more in detail appear in the record in this cause and from the assignment of errors which is presented and filed with this petition.

Wherefore, this plaintiff, considering himself aggrieved, prays that a writ of error may be allowed and may issue in this behalf to the Supreme Court of the United States to the end that said orders, rulings, decisions and judgment may be reviewed by the Supreme Court of the United States upon the question of the jurisdiction of the Court thereby determined, and that the errors so complained of may be corrected and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to said Supreme Court of the United States." (Printed Record, pp. 106, 107.)

The order of the Court allowing the writ of error made November 15, 1904, during the same term at which the orders on the motions were made and entered, and the judgment was rendered and entered, signed by the judge before whom all the proceedings in the Court below were had, first recites the orders made on the motion to remand and

the motion to set aside the service of the summons and then proceeds as follows:

"and final judgment dismissing said action for want of jurisdiction of the defendant having been rendered by this Court on the 23rd day of August, 1904, and entered on the 30th day of August, 1904; and the plaintiff on the 20th day of September, 1904, during the same term at which said orders and judgment were rendered and entered, having filed his bill of exceptions in said action; and the above named plaintiff, considering himself aggrieved by the rulings of this Court upon the question of jurisdiction of the Court in said action, having on this day during said term of court presented his assignment of errors and his petition praying for a writ of error from said judgment and orders to the Supreme Court of the United States to review said orders, judgment, rulings and decisions of this Court upon said question of jurisdiction, and praying that said writ of error be allowed him to the said Supreme Court of the United States, and that a full transcript of the record and proceedings in said cause duly authenticated be sent to said Supreme Court of the United States; and the jurisdiction of the Court being in issue in this case; and the only question arising in said action and the only question tried and decided by this Court therein being the question of the jurisdiction of the Court; and a bond for said writ of error in the penalty of five hundred dollars having been duly executed and having been approved by the Court;

Now, on reading and filing said petition, assignment of errors and bond, and during the same term of court at which said orders were made and entered and said judgment was rendered and entered; and on motion of Brown, Carlisle & Hugo, plaintiff's attorneys,

It is ordered and considered by the Court that said writ of error to the Supreme Court of the United States, from said orders and said

final judgment dismissing said suit for want of jurisdiction of the defendant, be and the same is hereby allowed and awarded upon said petition of the plaintiff, solely upon the question of the jurisdiction of the Court as prayed for in said petition, to review the question of jurisdiction of the Court in said petition mentioned, which is the only question arising herein.

Enter.

Dated the 15th day of November, 1904.

By the Court,
GEO. W. RAY,
U. S. Judge."

(Printed Record, pp. 113, 114.)

No further certificate concerning the question of the jurisdiction of the Court below in issue is necessary.

Excelsior Wooden Pipe Company vs. Pacific Bridge Company, 185 U. S., 282-284;

In re Lehigh Mining & Manufacturing Company, Petitioner, 156 U. S., 322-325-327;

Huntington vs. Laidley, 176 U. S., 668-673-674-675-676-677;

Interior Construction & Imp. Company vs. Gibney, 160 U. S., 217-219.

Shields vs. Coleman, 157 U. S., 168, 175, 176.

The similarity of the order allowing the writ of error in the case at bar and the order in the above cited case, reported in 156 U. S. 325, and the similarity of the petition, and the order in the case at bar and in the case in 157 U. S. 168-175, will be observed. The similarity of the judgment and of the

order allowing the writ of error in the case at bar, and the decree and order in the above cited case in 185 U. S., 282-284, and the similarity of the judgment, petition and order in the case at bar and in the case in 176 U. S., 668-673 to 677 will also be noted.

> "A judgment of the Circuit Court of the United States, against a party contending that that Court has no jurisdiction because the case has not been duly removed from a State Court, may be reviewed as to the question of jurisdiction by this Court upon writ of error directly to that court under the act of March 3, 1891, c. 517, Sec. 5." (Headnote.)
>
> *Powers vs. Chesapeake & Ohio Ry. Co.*, 169 U. S., 92.

The decision of the question of whether or not the Court acquired jurisdiction by a proper service of process, may be reviewed by this Court upon writ of error directly to the Circuit Court.

Shepard vs. Adams, 168 U. S., 618-622.

II.

WAIVER AND ESTOPPEL.

(FIRST GROUND OF MOTION TO REMAND, PRINTED RECORD, P. 95.)

The defendant waived, and is estopped from asserting, any right it may have had to remove this suit from the State Court to the Circuit Court of the United States, by obtaining from the State Court, on October 24th, 1903, *and after the defendant's attorneys had full and positive information of the amount of the judgment demanded by the plaintiff in the complaint*, (which information was

derived from the plaintiff's affidavit filed October 19, 1903, *and served on defendant's attorneys October 23, 1903*) the order staying all proceedings in the action on the part of the plaintiff, except the taking of plaintiff's deposition on November 2, 1903, pending the appeal that had been taken by the defendant from the order entered October 2, 1903, denying defendant's motion to set aside the service of the summons, and until ten days after the decision of such appeal, which order was entered October 26, 1903. (Printed Record, pp. 24-71.)

Manning vs. Amy, 140 U. S., 137-138-140-141;

Hanover Nat'l Bank vs. Benjamin Smith (C. C. S. D. New York—Opinion by Johnson, J.) 13 Blatchford's C. C. Reports, 224-226;

Case vs. Olney (C. C. S. D. Cal. Opinion by Wellborn, J.) 106 Fed. Rep., 433;

Chicago I. & N. P. R. Co. vs. Minn. & N. W. R. Co. (C. C. N. D., Iowa. Opinion by Shiras, J.) 29 Fed. Rep., 337-339-340;

State of West Virginia vs. King (C. C. S. D., West Virginia. Opinion by Goff, C. J.) 112 Fed. Rep., 369-370-371;

Hudson River Railroad & Terminal Co. vs. Day, (C. C. Dist. of N. J.) 54 Fed. Rep., 545;

Hulbert vs. Russo, (C. C. S. D. of N. Y. Opinion by Lacombe, C. J.) 64 Fed. Rep. 8;

The defendant's attorneys formed the intention to remove the suit to the Circuit Court of the

United States on or prior to October 22, 1903. The bond for such removal is dated on that day, (Printed Record, p. 4) and Mr. Purcell's affidavit says that he was informally advised on that day that the case would probably involve more than two thousand dollars and obtained the bond out of abundant precaution. (Printed Record, p. 102.)

Notwithstanding such intention, the defendant's attorneys procured from the State Court the order staying proceedings on October 24, 1903, upon the affidavit of Thomas Burns, one of such attorneys, verified October 16, 1903, in which, among other things, he said:

> "that on the 2nd day of October, 1903, an order was entered in this action at a special term of this court, denying a motion made by the defendant, appearing specially as aforesaid, to set aside the service of the summons herein, which was served without a complaint or notice, as deponent is informed and believes, on or about April 10th, 1903; that no complaint has been served or filed herein, as deponent is informed and believes; that on October 15, 1903, the defendant, through its said attorneys, appearing specially as aforesaid, served and filed a notice of appeal from said order to the Appellate Division of this court, Fourth Department, and has duly perfected said appeal from said order, and intends in good faith to prosecute the same, and that said defendant will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal, as plaintiff might make application to this Court for judgment herein." (Printed Record, pp. 25-26.)

It is true that defendant's attorneys may have formed and probably did form, the intention to remove the cause to the Federal Court, after this

affidavit was verified and after it was served on October 16, 1903, with notice of the motion for a stay to be heard October 24, 1903. *The essential fact is that the defendant presented this affidavit to the Court on October 24, 1903, and obtained the order staying proceedings from the Court on it on that day.* By presenting the affidavit to the Court on that day, the defendant on that day acted upon and reasserted to the Court the statements therein contained and represented to the Court that the facts stated in the affidavit continued to exist as they did on October 16, 1903, when the affidavit was verified; it was an assertion to the Court that on October 24, 1903, the defendant still intended to prosecute the appeal to the Appellate Division of the Supreme Court, Fourth Department, in good faith; it was an assertion and representation to the Court that on the 24th day of October, 1903, there was still danger that the defendant would suffer serious inconvenience and loss if proceedings under said order were not stayed, until the decision of the appeal, as plaintiff might apply to the State Court for judgment.

If the case was to be removed to the United States Court, there was no intention on the part of the defendant to prosecute the appeal to the Appellate Division of the State Court and defendant could not suffer any inconvenience or loss, if proceedings under said order were not stayed until the decision of the appeal, for if the case should be properly removed, the State Courts would thereby lose all jurisdiction to render judgment, hear the appeal or take any proceedings in the case. The order obtained is even broader than the affidavit, for it stays, not only proceedings under the order

appealed from, *but all proceedings* on the part of plaintiff, except the taking of the plaintiff's deposition, not until the decision of the appeal, *but until ten days thereafter.*

The defendant admits and shows, by the affidavit of one of its attorneys, that such attorney was informally advised, but not by the record, that the case would probably involve more than two thousand dollars, on October 22, 1903, the day the bond for removal was executed, and that on October 23, 1903, a copy of the plaintiff's affidavit, stating that the action was brought to recover $414,492.64, was served upon the defendant's attorneys with a copy of the order of the County Judge of Jefferson County for the taking of plaintiff's examination before trial. (Henry Purcell's affidavit, Bill of Exceptions, Printed Record, p. 102.)

Nevertheless, on the next day, *with full knowledge of all the facts*, the defendant's attorneys made the representations to the Court contained in the affidavit of Mr. Burns, and obtained the order staying proceedings. Of course, the Court would not have made this order, if the defendant's attorneys had informed it that they did *not* intend to prosecute the appeal to the Appellate Division in good faith, but did intend to remove the cause to the United States Court forthwith and had already procured a bond for that purpose.

If circumstances had arisen, after the making of the affidavit of Mr. Burns and the service of the notice of the motion based thereon, by reason of which the defendant did not intend to prosecute the appeal and did intend to remove the case to the United States Court, the defendant was in duty bound to withdraw or abandon its motion or to pre-

sent another affidavit stating the change of intention. This was a duty the defendant owed both to the Court and to the plaintiff.

The entire order of October 24, 1903, is made upon the theory that the cause was to proceed in the State Court.

The taking of the plaintiff's deposition had been set for November 2, 1903, by the order of the County Judge. If the cause was not to remain in the State Court, the putting of the clause in the order of October 24, excepting the taking of this deposition from the stay, was a *farce*, for the deposition proceedings would immediately go down, if the cause should be properly removed, for the State Court would immediately lose jurisdiction of the case.

Mr. Purcell states in his affidavit that the plaintiff's attorneys approved the order of October 24, 1903, in writing, upon the face thereof. It is true that the following appears at the foot of this order: "Approved, P. W. & B., B. C. & H." (Printed Record, p. 24) and that these are the initials of the attorneys for the respective parties.

It also appears in the order that it was made "after hearing Purcell, Walker & Burns in support of said motion, and Brown, Carlisle & Hugo, attorneys for plaintiff, *opposed*."

If the word "*approved*" with the initials of the attorneys of the respective parties is to be construed as a stipulation that the order be granted, rather than as an approval of the form of the order, after the court had announced the decision on the motion, the situation of the defendant is not improved in the least.

The order recites that it is made upon the said

affidavit of Thomas Burns. If not a representation to the Court, the taking of this order on the affidavit was a representation to the attorneys for the plaintiff that the facts stated in that affidavit continued to exist at the date of the order as they did at the time the affidavit was verified. The order and the approval were upon the representation, understanding and theory that the action was to remain in the State Court. If the initials of the attorneys for each party with and after the word "Approved" are to be considered as a stipulation that the order be granted, as implied in Mr. Purcell's affidavit, the taking of plaintiff's deposition, on November 2, 1903, in accordance with the order of the County Judge, being excepted from the stay, the stipulation was in effect a stipulation that such deposition could be taken on that day. If such was the stipulation, the filing of the petition for the purpose of removing the action from the jurisdiction of the State Court to the jurisdiction of the United States Court, on October 26th, 1903, was a violation of such stipulation.

In *Case vs. Olney*, 106 Fed. R., 433 (C. C. S. D. Cal. Opin. by Wellborn, J.) the Court held that the filing of a demurrer and the making of the following stipulation signed by the attorneys for the respective parties were a waiver of the right to remove the cause to the United States Court, to wit:

> "It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above entitled cause that the issue raised by the above demurrer shall not be called for hearing by the attorneys for either party to said cause, except upon one week's notice in writing to the adverse attorneys; and it is further agreed that the attorneys for the

plaintiff will not notice said issue for hearing before ninety days from this date.

Dated this 15th day of March, 1900."

In *Hulbert vs. Russo*, 64 Fed. R., 8 (decided by the Circuit Court, S. D. New York. Opinion by Lacombe, Circuit Judge), the Court said:

"He (the defendant) has done nothing in the State Court whereby he has secured some benefit which would estop him from repudiating his former action, as did the defendant in *Bank vs. Smith*, 13 Blatchf. 224, Fed. Cas. No. 6,035."

In *Hanover Nat. Bank vs. Benjamin Smith*, Impleaded, etc. (C. C. S. D. New York. Opinion by Johnson, J.) 13 Blatchford's C. C. Reports, 224-226, the Court said:

"The case was called for trial, and might, in the ordinary course, have been tried, when the defendant applied for a postponement. This was refused by the Court, except upon terms of the defendant's consenting to a reference. This he, in the first instance, refused to do; but afterwards, and before the trial was actually commenced, he consented to the reference of the cause for trial, to a person named. The order was made accordingly, and the immediate trial, which otherwise must have taken place, was thus avoided. Under these circumstances, the defendant ought to be considered as estopped from making an application to remove the cause. The case is not, in my judgment, within the meaning of the statute. Its language is general, but the right it gives is the right of the party concerned, and he may waive it. It is to be construed as if the right to waive its benefit were expressed in the statute. The defendant was in time to apply for a removal when his case was called for trial, but his consenting to a reference, under the circumstances as shown, ought, in justice, and does, I think, in law, preclude him from a

subsequent application to remove the cause. To hold otherwise would recognize a consent to a reference as an allowable resort to gain the postponement of a cause, and the consequent extension of the time limited for its removal into the Circuit Court.

The motion to remand the cause to the Supreme Court of the State of New York must be granted."

The taking of the order staying proceedings on October 24, 1903, on said affidavit of Thomas Burns, was an assertion by the defendant's attorneys to the Court and to the plaintiff's attorneys that they did not intend to abandon the appeal that had been taken to the Appellate Division, of the Court, but that they still intended "in good faith to prosecute the same."

In *Chicago I. & N. P. R. Co. vs. Minn. & N. W. R. Co.*, 29 Fed. R., 337, 339, 340 (C. C. N. Dist. Iowa. Opinion by Shiras, J.) the Court said:

"Furthermore, it appears from the record in this cause that, upon the decision on the application for the writ of injunction, the defendant took an appeal thereon to the Supreme Court of the State, and filed a *supersedeas* bond, and has thus carried the question whether the petition on its face shows facts authorizing the issuance of a writ of injunction into the Supreme Court. After this action on part of defendant, and without withdrawing or abandoning the appeal, the defendant, by filing a petition for removal in the District Court, claims that the jurisdiction of the State Court is ended. The defendant, by its own act, invoked the jurisdiction of the State Supreme Court; and, if I understand the position of counsel, it is claimed that defendant may still prosecute the appeal before the State Supreme Court, for the purpose of reversing the ruling authorizing the issuance of the writ of injunction, and at the same time

> may have the case pending in this court, to be proceeded with as though such appeal had not been taken. In effect the case would, in such event, be pending in two courts at one and the same time. This is not permissible. The cause must be wholly in one court or in the other. It cannot be split up into parts. To be removable, the case, as an entirety, must be brought into this court. By its own act, the defendant had, before petitioning for removal, carried, by appeal, the case into the Supreme Court, and no action has been taken which has lawfully terminated the jurisdiction of that Court. Under these circumstances, it must be held that the right of removal did not exist when the petition for removal was filed, and that the filing thereof in the District Court could not have the effect of terminating the jurisdiction of the Supreme Court of the state over the case."

In *Hudson River Railroad & Terminal Co. vs. Day*, 54 Fed. R., 545 (C. C. Dist. of N. J., Opinion by Green, J.), the Court held that a landowner who had appealed to a state court from the decision in condemnation proceedings against him waived his right of removal to the Federal Court by having the record of prior proceedings sent up on certiorari for review by the State Supreme Court.

In *Manning vs. Amy*, 140 U. S., 137-138-140-141, the Court said:

> "On the 29th day of December, 1884, the last day of the October term of the court, Manning filed what purported to be a petition and bond for the removal of the cause to the United States Circuit Court for the District of Massachusetts, and he also, simultaneously and in connection therewith, filed the following motion:
>
> 'Defendant's motion touching the removal of this action.
>
> "And now comes the defendant specially

and suggests to the Court that he has heretofore filed a motion to dismiss this action for causes therein set forth, and also a plea in abatement for causes therein set forth, but neither said motion nor said plea has yet been heard or determined by this Court, and the Court is about to adjourn without day.

He also suggests that he has herewith filed a petition for the removal of this cause to the Circuit Court of the United States for the District of Massachusetts, together with a suitable bond therefor, but that he has filed the same without prejudice to said motion or said plea.

Wherefore, in case said motion should not be allowed and in case said plea should not be sustained, he prays the Court to order the removal of this action, as prayed for in said petition.

JEROME F. MANNING,
By his Atty., Wilbur H. Powers.'

"No question is made as to the diverse citizenship of the parties, nor can it admit of a doubt that the application for removal, if it can be properly called such, was, when first filed, made at the proper time. If, therefore, the petition and bond had been in due form, and had been unaccompanied by the motion filed simultaneously with them, and as a part of them, it is equally clear that the removal to the Federal Court would have been properly effected.

* * * * * * * * * *

"We do not deem it necessary to pass upon these defects of the petition and the bond, for it is clear to our minds that, with the accompanying motion, they do not constitute a valid application for removal, as contemplated by the statute. Indeed, the proceeding was not even in intent an application for removal to take effect on the date of its filing. The petition, read and construed, as it must be, with the accompanying motion, asks not for a removal, but for the judgment of the court on a motion and a plea in abatement which, if ren-

dered as asked for, would have made a removal unnecessary and impossible. In any view, it was a mere conditional application for removal in case the court, after consideration of the motion to dismiss and the plea in abatement, should overrule both.

"The record recites that after the motion touching the removal of the case was filed with the petition and bond for removal, 'thence the same was continued *nisi* to the January term, 1885, the defendant *reserving* his *right* to remove to the Circuit Court of the United States as aforesaid,' the continuance being manifestly ordered for the purpose of an opportunity to hear and determine the said motion and plea. The avowed purpose of the defendant in the proceedings was to have the state court retain jurisdiction for the purpose of getting a judgment in his favor, and not to have the case removed unless the judgment went against him. It is clear that Congress did not, by the act of March 3, 1875, intend to allow the defendant 'to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings and take his suit to another tribunal.' (Removal Cases, 100 U. S., 457, 473.) Such a proceeding was not authorized by that act. We hold, therefore, that the proceedings in the state court on the 29th of December, 1884, did not have the effect to remove the cause to the Federal Court."

The similarity between the above case and the case at bar is very close, in that almost simultaneously with the filing of the petition and bond for removal and after the bond had been executed, the defendant in the case at bar represented to the court and to plaintiff's attorneys, that it intended to prosecute the appeal to the appellate division in good faith, and obtained the order staying proceedings on that ground. But the plaintiff's position in the case at bar is stronger than in the above

case: (1) for the reason that in the above cited case the defendant did not conceal from the court and the opposing counsel the fact that it intended to remove the cause to the United States court, but informed them of such fact; while in the case at bar the fact that the defendant intended to remove the cause was concealed; (2) because in the above case no action was secured from the state court beneficial to the defendant upon the theory that the action was to remain in the state court, while in the case at bar such beneficial action was secured, to-wit: the order staying proceedings on the part of the plaintiff until ten days after the decision of the appeal which had been taken to the Appellate Division.

The defendant's attorneys entered the order, staying proceedings pending, and until ten days after the decision of the appeal, that had been taken to the Appellate Division of the State Court, on the same day and probably at the same time, that they filed the petition for removal. These acts were absolutely inconsistent with each other. Having elected to remain in the State Court by obtaining the said order staying proceedings, the defendant was bound by such election.

III.

LACHES IN FILING PETITION FOR REMOVAL.

(SECOND GROUND OF MOTION TO REMAND. PRINTED RECORD, P. 96. FIRST OBJECTION TO MOTION TO SET ASIDE SERVICE OF SUMMONS, PRINTED RECORD, P. 97.)

The petition for removal was filed in the State Court too late to effect a removal of the suit to the Circuit Court of the United States.

The removal act provides that the petition for removal must be filed in the State Court "at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." (Act Aug. 13, 1888, c. 866, Sec. 3.)

In New York, the time, within which the defendant is required to answer or plead to the complaint of the plaintiff, is regulated by the Code of Civil Procedure. The following are sections of this code:

"Sec. 418. (Am'd 1877.) Form of Summons.

"The summons, exclusive of the title of the action and the subscription, must be substantially in the following form, the blanks being properly filled:

'To the above named defendant: You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment

will be taken against you by default, for the relief demanded in the complaint.

Dated .....

"The summons is deemed the mandate of the Court."

"Sec. 419. (Amended 1879.) Service of copy complaint or notice with summons; consequence of failure.

"A copy of the complaint may be served with the summons. If a copy of the complaint is not served with the summons, the plaintiff cannot take judgment by default without application to the Court, unless either the defendant appears, or by a notice is served with the summons, stating the sum of money for which judgment will be taken, and the case is one embraced in the next section."

"Sec. 421. Appearance of defendant.

"The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading, so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in Sec. 417 of this act, concerning the office address of the plaintiff's attorney."

In *Valentine vs. Myers' Sanitary Depot*, 36 Hun., 201, the General Term of the Supreme Court of New York, Second Department, held that a motion made by the defendant to make the complaint more definite and certain was not equivalent to an appearance. In the opinion the Court said:

"Before the present Code a notice of motion was held in many cases to be an appearance. * * * The Code (Sec. 421) now provides that an appearance *'must be made'* by notice of appearance, copy demurrer or copy answer."

In Wood vs. Furtick (Supreme Court, Appel-

late Term, First Department), 40 N. Y,. Supp. 687-689, the Court said:

> "We are of the opinion that the service of the defendant's notice of motion to vacate the service of the attachment, and the attempted levy thereunder, did not constitute a general appearance in the action. We are referred by the counsel for the plaintiff to a number of cases, neither of controlling authority, which are to the effect that service of a notice of motion which does not expressly qualify the party's appearance, is equivalent to a general appearance in the action. The cases alluded to, however, are such as arose before the present Code of Civil Procedure, and such as followed them without notice of the effect wrought by the Code. It is now provided that, if the defendant wishes to appear in the action, he must serve either an express notice of his appearance or a demurrer or answer. Code Civil Procedure, Sec. 421. The better opinion seems to be that a general appearance cannot now be effected in any other way.
>
> *Couch vs. Mulhane*, 63 How. Pr., 79.
>
> *Benedick vs. Arnoux*, 38 N. Y. Supp., 882."
>
> S. C. 17 Misc., 561.

If the above authorities, construing Sec. 421, are not "good law," the defendant has done several things in the action which constitute a general appearance. These acts of the defendant are specified in the 17th, 18th, 19th, 20th, 21st and 22nd assignments of error. If this Court should disagree with the above cases, in construing Sec. 421, we urge these six assignments of error upon the consideration of the Court. What, in that event, would be the result so far as the question whether the defendant made a general appearance is concerned, is discussed in Point X of this Brief. If this Court agrees with the cases cited, construing

Sec. 421, then, of course, the above mentioned six assignments of error are not well taken.

The following are sections of said Code of Civil Procedure:

"Sec. 422. (Amended 1877.) When defendant must answer before time to appear expires.

"A defendant, upon whom the plaintiff has served, with the summons, a copy of the complaint, must serve a copy of his demurrer or answer, upon the plaintiff's attorney, before the expiration of the time within which the summons requires him to answer. If a copy of the complaint is not so served, a notice of appearance entitles him only to notice of the subsequent proceedings, unless within the same time he demands the service of a copy of the complaint as prescribed in Sec. 479 of this act."

"Sec. 479. (Amended 1877.) Copy complaint, when to be served.

"If a copy of the complaint is not delivered to a defendant, at the time of the delivery of a copy of the summons to him, either within or without the State, his attorney may, at any time within twenty days after the service of the summons is complete, serve upon the plaintiff's attorney a written demand of a copy of the complaint, which must be served within twenty days thereafter. The demand may be incorporated into the notice of appearance. But where the same attorney appears for two or more defendants, only one copy of the complaint need be served upon him; and if, after service of a copy of the complaint upon him, as attorney for a defendant, he appears for another defendant, the last defendant must answer the complaint within twenty days after he appears in the action."

"Sec. 480. Consequence of failure.

"If the plaintiff's attorney fails to serve a copy of the complaint, as prescribed in the last section, the defendant may apply to the Court for a dismissal of the complaint."

It will be noted that Sec. 479 says:

> "*The demand* (for a copy of the complaint) *may be incorporated into the notice of appearance.*"

This permission indicates that it was the intention of the Legislature that this demand could be made without making an appearance in the case. When this section is read in connection with the above authorities construing the above quoted Sec. 421, which says:

> "The defendant's appearance *must be made by serving* upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, *a notice of appearance or a copy of a demurrer or of an answer,*"

it is clear that the defendant could have demanded a copy of the complaint without appearing in the case. If the defendant had done this, it would have been in precisely the same position it would have occupied if the complaint had been served with the summons, and within twenty days after the service of the complaint, in compliance with the demand, could have filed its petition for a removal of the suit to the Federal Court.

It is evident that the law was framed with just such a case as the one at bar in view, and to put a defendant, who is served with a summons without a complaint, in exactly the same position, with the same privileges and advantages, as if the complaint had been served with the summons; the defendant failed to avail itself of the right, given it by the statute, to know what was in the complaint and the amount of the plaintiff's demand, without making a general appearance. The fact that the defendant failed to avail itself of its statutory rights and

failed to demand a copy of the complaint and allowed the statutory time for so doing to go by, and the right of the plaintiff to enter judgment to accrue, cannot operate to extend the time for filing the petition for removal, until defendant's attorneys accidentally learn the amount of the judgment demanded in the complaint. The removal act does not say that the defendant may file the petition at the time, or within a certain time after he or his attorneys learn the amount in dispute, but says the petition must be filed at the time or before the time the defendant is required to answer or plead to the declaration or complaint of the plaintiff. He certainly has no right to answer or plead after the plaintiff's right to enter judgment has accrued.

Section 520 of the said Code reads as follows:

> "Sec. 520. Pleadings to be subscribed; within what time to be served.
>
> "A pleading must be subscribed by the attorney for the party. A copy of each pleading, subsequent to the complaint, must be served on the attorney for the adverse party, within twenty days after service of a copy of the preceding pleading."

In addition to the above quoted Sec. 419, the following sections of the Code relate to the entry of judgment by default, where the summons is personally served:

> "Sec. 420. (Amended 1877.)
>
> "Judgment may be taken without application to the Court, where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only; or an express or

implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person; and thereupon demands judgment for a sum of money only. This section includes a case where the breach of the contract, set forth in the complaint, is only partial; or where the complaint shows that the amount of the plaintiff's demand has been reduced by payment, counterclaim, or other credit."

"Sec. 1212. (Amended 1879.) Judgment by default in certain actions on contract; how taken.

"In an action specified in section four hundred and twenty of this act, where the summons was personally served upon the defendant, and the copy of the complaint, or a notice stating the sum of money for which judgment will be taken, was served with the summons, or where the defendant has appeared, but has made default in pleading, the plaintiff may take judgment by default, as follows:

"1. If the defendant has made default in appearing, the plaintiff must file proof of the service of the summons, and of a copy of the complaint or the notice; and also proof, by affidavit, that the defendant has not appeared. Whereupon the clerk must enter final judgment in his favor.

"2. If the defendant had seasonably appeared, but has made default in pleading, the plaintiff must file proof of the service of the summons, and of the appearance or of the appearance only; and also proof, by affidavit, of of the default. Whereupon the clerk must enter final judgment in his favor.

"If the defendant has made default in appearing or pleading, and the case is not one where the clerk can enter final judgment, as prescribed, in either of the foregoing subdivisions of this section, the plaintiff must apply to the court for judgment, as prescribed in Sec. 1214 of this act."

"Sec. 1213. Amount of judgment in such cases; how determined.

"Where final judgment may be entered by the clerk, as prescribed in the last section, the amount thereof must be determined as follows:

"1. If the complaint is verified, the judgment must be entered for the sum for which the complaint demands judgment; or, at the plaintiff's option, for a smaller sum; and if a computation of interest is necessary, it may be made by the clerk.

"2. If the complaint is not verified, the clerk must assess the amount due to the plaintiff, by computing the sum due upon an instrument for the payment of money only, the nonpayment of which constitutes a cause of action, stated in the complaint; and by ascertaining, by the examination of the plaintiff, upon oath, or by other competent proof, the amount due to him for any other cause of action stated in the complaint. If an instrument, specified in this subdivision, has been lost, so that it cannot be produced to the clerk, he must take proof of its loss and of its contents. Either party may require the clerk to reduce to writing and file the assessment, and the oral proof, if any, taken thereupon."

"Sec. 1214. (Amended 1877, 1900.) Application to Court for judgment by default; when necessary.

"Where the summons was personally served upon the defendant, within the State, and he has made default in appearing, or where the defendant has appeared, but has made default in pleading; and the case is not one where the clerk can enter final judgment, as prescribed in the last two sections, the plaintiff may apply to the Court, or to a judge or justice thereof out of court, for judgment. Upon the application he must file, if the default was in appearing, proof of service of the summons; or, if the default was in pleading, proof of appearance, and also, if a copy of the com-

plaint was demanded, proof of service thereof, upon the defendant's attorney; and in either case, proof by affidavit, of the default which entitles him to judgment. If one or more of the defendants have appeared, and one or more defendants have failed to appear, then the application for judgment must be made to the Court, unless the defendants who have appeared consent to the making of such application to a judge or justice out of court."

"Sec. 1215. (Amended 1877, 1901.) Proceedings on such an application.

"The Court, or a judge or justice thereof, must thereupon render the judgment to which the plaintiff is entitled. It, or they, may, without a jury, or with a jury if one is present in court, make a computation or assessment, or take an account, or proof of a fact, for the purpose of enabling it, or them, to render the judgment, or to carry it into effect; or it, or they, may in its, or their, discretion, direct a reference, or a writ of inquiry, for either purpose; except that where the action is brought to recover damages for a personal injury or an injury to property, the damages must be ascertained by means of a writ of inquiry. Where a reference or writ of inquiry is directed, the Court, or a judge or justice thereof, may direct that the report or inquisition be returned to the court, or a judge or justice thereof, for its, or their, further action; or it, or they, may in its, or their, discretion, except where special provision is otherwise made by law, omit that direction; in which case final judgment may be entered by the clerk, in accordance with the report of the referee, or for the damages, ascertained by the inquisition, without any further application."

Under these sections, if there had been no stipulation extending defendant's time to appear, the plaintiff could have applied to the court or to a justice thereof on the 1st day of May, 1903, for judgment. But the first stipulation gave the de-

fendant twenty days additional time to appear, generally or specially. This extended the time to appear to and including the 20th day of May, 1903. The next stipulation is dated May 23, 1903. Hence, the defendant was in default on the 21st and 22nd days of May, 1903, and the plaintiff could have applied to the court or a justice thereof for judgment on those days. The stipulation dated May 23, 1903, extended the defendant's time to appear, generally, until ten days after the hearing and decision of the motion made by the defendant to set aside the service of the summons. The order, deciding this motion, was made and dated September 28, 1903, and entered October 2, 1903, and a copy with notice of such entry was served the same day. (Printed Record, p. 102.) Hence, the stipulation dated May 23, 1903, expired *at the latest* on October 12, 1903, and between that date and the making of the order staying proceedings on the part of the plaintiff on October 24, 1903, the plaintiff could have applied to the court or a judge for judgment; and the defendant has been in default ever since the expiration of the second stipulation.

The pendency of the motion to set aside the service of the summons did not have the effect to extend the time to appear or answer.

> *Wedekind vs. Southern Pacific Company*, 36 Fed. Rep., 279-280.
>
> *Olds vs. City Trust, Safe Deposit and Surety Co.*, (C. C. Dist. of Mass. Opinion by Lowell, J.) 114 Fed. Rep., 975.

The order, granted October 24, 1903, did not extend the time to answer. It contained a stay of proceedings pending the appeal and until ten days

after the decision thereof. But a stay of proceedings under the Code does not operate to extend the time for pleading.

Platt vs. Townsend (Gen. Term, Dec.), 3 Abb. Pr., 9.

Sniffen vs. Peck, 6 N. Y. Civ. Pro. R., 188.

McGowan vs. Leavenworth, 2 E. D. Smith, 24.

In *Platt vs. Townsend, supra,* an order for a bill of particulars had been obtained accompanied by a stay of proceedings, but without an extension of time to plead.

The order granted October 24, 1903, contains these words:

"That the defendant be relieved from any default in appearing herein."

It will be noted that this does not relieve from default *in answering.* We are at a loss to know what the person, who drew the order, expected to accomplish by the insertion of these words in the order. They would not prevent the entry of judgment without an extension of the time to appear or answer. The stay granted by the order accomplished the purpose of preventing entry of judgment. These words did not extend the defendant's time to appear or answer, and the Court could not extend the time to answer, for the defendant had not complied with Rule 24 on that subject, set forth in Mr. Carlisle's affidavit. (Printed Record, p. 99.) The only explanation of these words which occurs to us, is that the attorney who drew the order, having the secret intention of filing the petition for removal immediately after the entry of the order, and having already procured the execution of the bond for that purpose, had an idea

that these words in the order would restore the right to file the petition for removal, which the defendant had lost by its default; but the Court granting the order could have had no intention of restoring such right, for the order was made upon the theory that the action was to remain in the State Court, and upon an affidavit stating that the defendant intended to prosecute the appeal, it had taken to the Appellate Division of that court, in good faith.

But, if the Court had made an order expressly restoring to the defendant the right to file the petition for removal, such order would have been beyond its power. Neither the State nor Federal Court has power to restore such right, lost by lapse of time, any more than it has power to restore a right to appeal which has lapsed.

Mr. Purcell says in his affidavit:

> "Deponent further says that on June 25 he was suddenly taken ill, left his office, and on account of such illness, did not return to it and was not able to return to it until October 15, 1903. * * * * That on October 15, defendant filed and served notice of appeal from the order denying the said motion, and on that day deponent discovered that the defendant was in default in appearing. That this was due entirely to deponent's illness." (Bill of Exceptions, Printed Record, pp. 101-102.)

This illness might have been such an excuse that the Court, in its discretion, would open the default and allow the defendant to appear and answer, but the time within which a petition for removal may be filed is not a matter of discretion; it is a matter of strict legal right, over which the Court has no control.

Mr. Purcell's illness was no more an excuse which would extend the time for filing the petition, than the snowstorm which blocked a train and prevented an attorney from filing a petition for removal in time, was such an excuse, in

Daugherty vs. Western Union Tel. Co., 61 Fed. Rep., 138.

In *Kansas City, &c., Railroad Company vs. Daugherty*, 138 U. S., 298-303, the Court said:

> "The statute is imperative that the application to remove must be made when the plea is due, and because a plaintiff in error does not take advantage of his right to take judgment by default, it cannot be properly held that he thereby extends the time for removal."

As we have shown, the defendant, before the petition for removal was filed, was in default, with or without the stipulations.

The obtaining of the order of October 24, 1903, by the defendant, relieving it from its default, was an acknowledgment on its part that it was in default. This order, as we have shown, contained no extension of time to appear or answer. Consequently the defendant was in default on October 26, 1903, when the petition for removal was filed.

Although the State Court was clothed with power to open the default and allow the defendant to appear or answer, the opening of the default, if granted, could not restore the defendant's right, once lost, to file the petition for removal.

Price vs. Lehigh Val. R. Co. (C. C. Nor. D. of N. Y.), 65 Fed. Rep., 825-826. (Opinion by Coxe, J.)

Rock Island Nat. Bank vs. J. S. Keator Lumber Co. (C. C. Nor. D. of Ill.) 52 Fed. R., 897. (Opinion by Blodgett, J.)

Hurd vs. Gere (C. C. Nor. D. of N. Y.) 38 Fed. R., 537 (Opinion by Wallace, J.)

Austin vs. Gagan, 39 Fed. R., 626-628. (C. C. Nor. D. of Cal. Opinion by Sawyer, J.)

In *Price vs. Lehigh Val. R. Co.*, 65 Fed. R., 825-826, Judge Coxe said:

"When the defendant permitted the twenty days allowed by the New York Code of Civil Procedure to expire without legal extension, it lost the right to remove. The defendant was required 'by the laws of the State' to answer the complaint on or before October 19, 1894. Assuming that the language of the removal act 'or the rule of the State Court' (25 Stat., 433, 435) is applicable where the time to answer is fixed by the laws of the State, it does not aid the defendant. The time to answer was not extended by a rule of the State Court. It was extended pursuant to an understanding between the parties for their mutual convenience. Oral stipulations of this kind are not recognized. Rule 11, N. Y. Sup. Ct.; Leese vs. Schermerhorn, 3 How. Pr., 63; Broome vs. Wellington, 1 Sandf., 664. In legal contemplation it was as if a default existed after October 19, and, although the State Court was clothed with power to enlarge the time and even to open a default, and receive defendant's answer, it had no power to revive a right once lost by non-compliance with the statute. The removal on December 13 was too late. It was sanctioned neither by statute nor by rule. Doyle vs. Beaupre, 39 Fed., 289, and cases cited: Austin vs. Gagan, Id., 626; Dulbanco vs. Singletary, 40 Fed., 177; Velie vs. Accident Co., Id., 545; Daugherty vs. Telegraph Co., 61 Fed., 138; Spangler vs. Railroad Co., 42 Fed., 305; Bowers vs. Supreme Council, 45 Fed., 81. Remand granted."

In *Rock Island Nat. Bank vs. J. S. Keator Lumber Co.*, 52 Fed. R., 897-898, Judge Blodgett said:

> "These defendants, then, were in default, and had lost their right of removal on the 13th day of December, when the rule extending the time to plead was entered in pursuance of the stipulation of the complainant; and I cannot see how this stipulation, or the order of court made in pursuance thereof, can be construed to restore to the defendants the right of removal which they had lost. The complainant may have been entirely willing that these defendants should have the right to put in any defense which they might have had in the State Court, but a mere agreement to that effect is not and cannot, in justice, be held to waive or restore to the defendants the right of removal which they had lost. For these reasons the motion to remand is sustained, without considering or passing upon the question whether or not the case presents a separable cause of action which would entitle these defendants to remove the case."

In *Austin vs. Gagan*, 39 Fed. R., 626-628, the Court held that the Court cannot, by an order made after the time to answer has expired, directing the bond to be filled *nunc pro tunc* as of a day prior to such expiration of time, cut off the right of the plaintiff to remain in the State Court, which has already become vested and fixed under the statute.

In *Boers vs. Preston*, 111 U. S., 252-255, the Court said:

> "The courts of the Union being courts of limited jurisdiction, the presumption, in every stage of the cause, is, that it is without their jurisdiction unless the contrary appears of record. Grace vs. American Ins. Company., 109 U. S., 278-283; Robertson vs. Cease, 97 U. S., 646."

IV.

CASES, HOLDING A VOID SERVICE OF SUMMONS DOES NOT SET TIME RUNNING, NOT IN POINT.

In the Court below, the defendant cited the cases of *Cady vs. Associated Colonies*, 119 Fed. R., 420; *Donohue vs. Calumet Fire-Clay Co.*, 94 Fed. R., 23, and *Tortat vs. Hardin Mining and Manufacturing Co.*, 111 Fed. R., 426, in which it was held that an illegal and void service of a summons did not set the time mentioned in the Removal Act to running, and that in such a case the petition for removal may be filed at any time, and even after entry of judgment. Those cases are not in point in the case at bar, for the reason that in not one of them was there an adjudication in the State Court, at the time the petition for removal was filed, adjudging that the service of the summons was legal and valid.

In the case at bar there was such an adjudication, made on defendant's motion, at the time the petition for removal was filed.

The order of the State Court denying the ~~plaintiff's~~ defendant's motion to set aside the service of the summons has never been reversed or set aside.

This decision of the State Court, whether right or wrong, is the law of the case, and was binding alike upon the defendant and the State and Federal Courts.

Duncan vs. Gegan, 101 U. S., 810-812.

Loomis vs. Carrington (E. D. Mich. Opinion by Brown, J.), 18 Fed. R., 97-99.

Bragdon vs. Perkins-Campbell Co. (C. C. W. Dist. Pa. Opinion by Acheson, C. J.), 82 Fed. R., 338.

Allmark vs. Platt S. S. Co. (C. C. E. Dist. N. Y. Opinion by Benedict, J.), 76 Fed. R., 615.

Davison vs. Shawmut Min. Co. (C. C. W. Dist. N. Y.), 124 Fed. R., 860.

Olds vs. City Trust, Safe Deposit and Surety Co. of Phila. (C. C. Dist. Mass., Opinion by Lowell, J.), 114 Fed. R., 975.

Brooks vs. Farwell (C. C. Dist., Col.) 4 Fed. R., 166.

Kidder vs. N. W. Mut. Life Ins. Co., 117 Fed. R., 997-998.

This question will be more fully discussed in Point IX of this Brief, in connection with a discussion concerning the power of the Circuit Court to review the order of the State Court or to make an order setting aside the service of the summons, while the order of the State Court denying a similar motion remained unreversed.

V.

WHEN DID THE CASE BECOME REMOVABLE?

Mr. Purcell, in his affidavit, says:

"Deponent further says that on or about October 19, 1903, the plaintiff applied *ex parte* upon the affidavits of the plaintiff, Hiram Remington, and others, to the County Judge of Jefferson County, for an order to examine the said plaintiff before trial, which was granted on that day by said Judge and there-

after and on October 23, 1903, copies of said affidavits and order were served on deponent's firm. That it was on the day last mentioned, to-wit: October 23, 1903, that it appeared for the first time from the papers or record in this action that the amount involved therein was two thousand dollars, exclusive of interest and costs, and this was shown and appears by a statement in said affidavit of Hiram Remington, when he states in substance that the action was brought to recover $414,492.64. That the case thereupon became a removable controversy." (Bill of Exceptions, Printed Record, p. 102.)

If it be true that a suit is not removable until some paper, disclosing the amount of the judgment demanded, is filed or served on the defendant, most default cases, in which the complaint was not served with the summons, do not become removable until judgment is entered, for the law does not require the filing of the complaint before the entry of judgment, and it is generally the practice not to file the complaint in such cases until judgment is entered.

Had the defendant filed the petition for removal within twenty days after the service of the summons in the case at bar, if the defendant's contention on this point is correct, the plaintiff could have had the case remanded to the State Court upon the ground that the petition was prematurely filed, and the case was not removable at that stage.

The Court, in *Coffin vs. Philadelphia W. & B. R. Co.* (C. C. S. Dist. N. Y. Opinion by Lacombe, C. J.), 118 Fed. R., 688, did not agree with the opinion expressed in Mr. Purcell's affidavit.

In that case, the summons *without complaint* was served September 3, 1902. On September 19,

the defendant removed the cause to the Circuit Court of the United States on its petition averring that the matter in dispute was in excess of $2,000. Thereafter, the complaint was served claiming damages in the sum of $2,000. This, if served with the summons, would not have been sufficient to give the U. S. Court jurisdiction, but the Circuit Court refused to remand the case on the authority of *Zinkeisen vs. Hufschmidt,* Fed. Cas. No. 18,214.

In the Coffin case, the Court held the cause removable before the service or filing of the complaint or any other paper disclosing the amount in controversy.

In the case of *Zinkeisen vs. Hufschmidt* (Case No. 18,214), 30 Fed. Cas., 933, the following appears:

> "This action was brought in the State Court to recover the value of a quantity of wheat. Upon the defendant's application, an order of removal to the Circuit Court of the United States was granted by Judge Small of the State Court. At the time he made the order, no pleading or writ was on file showing the amount in dispute, except the petition of the defendant, asking for the removal. After the order was granted, Zinkeisen & Co. filed a complaint in the State Court, alleging the cause of action and claiming damages in a stated sum. In that complaint they obtained an order from Judge Small to show cause why the order made by him, removing the cause into the Federal Court, should not be vacated and set aside. On hearing the order to show cause, Judge Small refused to vacate the order of removal. On the first day of the session of the United States Circuit Court after the order of removal, Hufschmidt brought into the Court a certified copy of the papers filed in the State Court, including the complaint filed after the order of removal was granted, and asked that

said papers might be filed and the cause docketed in that court. The motion was argued before one of the judges of the United States District Court, who denied it, holding that the complaint filed after the order of removal was conclusive as to the amount in dispute. A motion was then made before Drummond, District Judge, to vacate and set aside the order made by the district judge, and that the cause be docketed, and after argument the order was set aside and the plaintiffs required to file a declaration. This settles a question of practice which has perplexed the profession in the state, and also settles that when the plaintiff chooses to commence suit by summons, and not file either his summons or complaint, the defendant, in a proper case for removal, may enter an appearance and show by petition that a suit has been commenced, and the amount claimed exceeds $500, and tender a proper bond, and thus secure a removal of his cause into a federal court; and when he has done this, it is not in the power of the plaintiff to destroy that right by filing a complaint in the state court reducing his damages below $500; and that, when a cause is once properly in a federal court, the plaintiff cannot then file a declaration laying his damages at less than $500, and cut off the jurisdiction."

The case of *Beck & Pauli Lith. Co. vs. Wacker & Birk B. M. Co. et al.*, 76 Fed. R., 10, was removed to the United States Circuit Court before the complaint or any paper disclosing the amount claimed had been served or filed.

In the case at bar, the defendant had much more information concerning the nature of the controversy than the defendant in the cases cited appears to have had. The plaintiff's affidavits which were presented to the court on defendant's motion on June 9, 1903, disclosed fully the nature of the con-

troversy and stated that the plaintiff had *sustained damages in a large amount.*

The defendant in the case at bar could have filed a petition before the time it admits it became in default with as clear a conscience as the defendants in the above cases. The Removal Act does not require the petition to be verified.

> "It is settled beyond dispute that no verification is necessary to the sufficiency of the petition."
>
> *Osgood vs. Chicago, Etc. R. Co.*, 6 Biss. U. S., 330, 336.
>
> *Connor vs. Scott*, 4 Dill U. S., 243.
>
> *Allen vs. Ryersen*, 2 Dill U. S., 501.
>
> *Sweeney vs. Coffin*, 1 Dill U. S., 73.
>
> *Houser vs. Clayton*, 3 Woods U. S., 273.

THE POWERS CASE.

In the court below, the defendant placed great reliance upon the case of *Powers vs. Chesapeake & Ohio Ry. Co.*, 169 U. S., 92, and that case will undoubtedly be its main reliance is this court.

We are unable to discover any resemblance between the Powers case and the case at bar. But, if they were otherwise exact counterparts, the cases differ in one most important particular. In the Powers case the defendant had taken no step in defense of the action, in the state court, between the time the plaintiff dismissed the action as to the local defendants (which made the controversy removable), and the time of filing the petition for removal.

In the case at bar, the defendant took a very important step in defense of the action, in the state court, between the service on the defendant's attor-

neys, on Oct. 23rd, 1903, of plaintiff's affidavit (which defendant claims first made the suit removable) and the filing of the petition for removal on October 26, 1903.

In the case at bar, on October 24, 1903, the defendant procured from the state court the order relieving it from its default in appearing and staying proceedings on the part of the plaintiff, thereby completely tying the plaintiff's hands, except in the matter of plaintiff's deposition, pending the appeal and until ten days after its decision; and the defendant caused the order to be entered October 26, 1903.

In the Powers case, the court expressly bases the decision on the fact that the defendant had not taken any new steps in defense of the action between the time, when the action became removable, and the time the petition for removal was filed.

In the opinion the Court said:

> "For the reasons before stated, we are of the opinion that, upon the true construction of the act of Congress, the petition, filed as soon as the case became a removable one, *and before the railway company took any new steps in defense of the action, was seasonably filed.*" (Page 102).

The facts in the Powers case were very peculiar and the decision cannot be considered authority except in a case surrounded by the same peculiar circumstances. This Court refused to follow it in two cases differing but slightly from it. These cases are *Kansas Suburban Belt Ry. Co. vs. Herman,* 187 U. S., 63, and *Whitcomb vs. Smithson,* 175 U. S., 635, which were precisely similar to the Powers case, except that there had been no fraud in the joinder of the local defendants and the cases were

not voluntarily dismissed as to these defendants by the plaintiff, but were dismissed as to them by the Court on the trial. The Court held in the two cases cited that the defendant remaining, who was a non-resident, did not have the right to remove the action to the United States Court.

If the Powers case is to be followed literally, the last two cases cited became for the first time removable, and there first appeared "of record to be a removable controversy" in such cases upon the dismissal of the actions as to the local defendants on the trial and under the decision in the Powers case the remaining defendant would have had the right to then file its petition for removal.

In the above *Kansas City Suburban Belt Ry.* case, the petition alleged fraud in the joining of the two local defendants, and the Court intimates that, if this allegation had been proved, it would have followed the Powers case, notwithstanding the fact that the action was not voluntarily dismissed as to the local defendants but was dismissed as to them by the Court on the trial. The Court says:

> "But apart from this, the averments of fraud were specifically denied, and, so far as this record discloses, the petitioner, who had the affimative of the issue, failed to make out its case. *Plymouth Mining Company vs. Amador Canal Company,* 118 U. S., 264, 270.
>
> Doubtless the general rule is that issues of fact raised on petitions for removal should be tried in the Circuit Court of the United States, but petitioner did not file the record in the Circuit Court, and as the issue was correctly disposed of, it would be absurd to send the case back to be removed for the purpose of being remanded, and we are obliged to deal with the record as it is. Nor was the evidence introduced on plaintiff's behalf, and demurred to,

made part of the record, and the bare fact that the trial court held it insufficient to justify a verdict against the Terminal Company was not conclusive of bad faith. The trial court may have erred in its ruling, or there may have been evidence which, though insufficient to sustain a verdict, would have shown that plaintiff had reasonable ground for a *bona fide* belief in the liability of both defendants. In these circumstances, the case comes within *Smithson vs. Whitcomb*, and the judgment must be affirmed" (pp. 70, 71.)

No claim of fraud committed by the plaintiff has been made in the case at bar, in the petition or otherwise. Neither is there any claim made that there has been any change in the amount demanded by the plaintiff since the service of the summons. The claim is simply made that *the defendant's attorneys* were ignorant of the amount of the plaintiff's demand, although the Code provided a way for them to learn the amount, without appearing, and although after the affidavits of the plaintiff were presented in court on June 9, 1903, they had every reason to believe that the amount was more than $2,000. After receiving the information they did on June 9, 1903, why did they not at once follow the practice laid down in *Coffin vs. Philadelphia W. & B. R. Co., supra*, and file the petition for removal? Evidently because they expected that after they had served additional affidavits, which the defendant was, on June 9th, granted leave to serve, the Court would decide the motion to set aside the service of the summons in defendant's favor, and were therefore willing to remain in the state court.

THE PETITION FOR REMOVAL INSUFFICIENT.

(PLAINTIFF'S FOURTH OBJECTION FILED NOVEMBER 10, 1903. BILL OF EXCEPTIONS. PRINTED RECORD, P. 97.)

The defendant does not state *in its petition* or elsewhere when it first learned that the matter in dispute was over $2,000, and does not *in the petition* or elsewhere state that it was at any time ignorant of the fact. The petition states that the action was brought on or about the 10th day of April, 1903, *but does not attempt to show why the petition for removal was not made until October* 26, 1903. (Printed Record, p. 2.)

The petition does say:

> "That the time has not yet arrived, at which the defendant is required by the laws of the state of New York, or the rules of the Supreme Court of the state of New York, in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff."

But this was a mere conclusion of law. The petition should have set forth facts, if they existed, which taken in connection with the facts already on the record in the case would show the Court that the above conclusion of law was correct.

In the Powers case, so much relied upon by the defendant, the facts showing that the action had become for the first time removable at the time the petition was made, *were set forth in the petition.* The opinion says:

> "A petition for removal, when presented to the state court, becomes a part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the

right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and if it does, the Circuit Court of the United States cannot allow an amendment of the petition, but must remand the case.

* * * * * * *

"In the case at bar, the second petition for removal, as presented to the state court, alleged that the petitioner was a citizen of the states of Virginia and West Virginia, only, that Evans and Hickey had been fraudulently and improperly joined as defendants for the purpose of defeating the petitioner's right of removal, that because of their joinder the case had been remanded to the state court, and that the action, having been discontinued against them, was now for the first time pending against the petitioner alone; and by the transcript, previously filed in the state court, of the record of the proceedings in the Circuit Court of the United States upon the first petition for removal, it appeared to have been admitted that the individual defendants were citizens of Kentucky.

"It was thus made to appear, on the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable by reason of the diverse citizenship of the parties. Such being the case, it was rightly removed by the second petition for removal into the Circuit Court of the United States and this petition was rightly permitted to be amended in that court" (pp. 101, 102.)

In *Kansas City Suburban Belt Ry. Co. vs. Herman,* 187 U. S., 63-70, the Court said:

"The second petition did not state when petitioner was first informed of the alleged fraud, but left it to inference that it was not until after plaintiff had introduced his evi-

dence, notwithstanding the averments in the first petition" (p. 70.)

The defendant has attempted to add certain facts to the petition by filing the affidavit of Mr. Purcell in the court below, which affidavit was made in the federal court after the record on removal had been filed; but the petition cannot be added to in this way. *All the jurisdictional facts must appear in the petition or in the record as it had been made in the state court before the filing of the petition, and cannot be shown by amendment in the Circuit Court of the United States.*

Jackson vs. Allen, 132 U. S., 27-34.

Orchore vs. Ohio & Miss. Ry. Co., 131 U. S., 240.

Cameron vs. Hodges, 127 U. S., 322.

In the last case cited the defendant attempted to cure the defects by affidavits filed in the United States Court. It is held in this case that this court, of its own motion, uniformly takes the objection of want of jurisdiction of the Circuit Court. Under the above authorities the petition was clearly insufficient, and cannot be amended.

But if Mr. Purcell's affidavit be added to the petition, it fails to state that *the defendant* was ignorant of the amount in dispute at the time the summons was served or when *the defendant* first obtained information that the matter in dispute exceeded the sum of $2,000 exclusive of interest and costs.

He says that the affidavit of the plaintiff stating the amount was served on *his firm* on October 23, 1903, and that on October 22, 1903, *he* was informally advised that the case would probably involve

more than two thousand dollars. For aught that appears, he may have been thus advised *by the defendant* and the defendant may have known at the commencement of the action the amount in dispute. There is nowhere in the record any statement by anyone showing when *the defendant* first learned that the amount involved was over two thousand dollars. (See Mr. Purcell's Affidavit, Printed Record, p. 101.)

VI.

DEFENDANT IN DEFAULT. HENCE NO CONTROVERSY. HENCE ACTION NOT REMOVABLE.

In the case of *Berrian vs. Chetwood*, 9 Fed. R., 678 (Circuit Court, S. D. N. Y.), Blatchford, C. J., said:

> "Even conceding that there were proper written extensions of time to answer till November 1st, nothing that then or before or afterwards occurred in oral conversations between the attorneys amounted to a consent by the plaintiff's attorney to extend the time to answer beyond November 1st. So, on November 3rd, when the petition for removal was presented and the bond approved, the defendant's time to answer had expired, he was in default; and there was no controversy between him and the plaintiff, within the meaning of the statute, so as to make a case for removal.
>
> The motion to remand the cause is granted, with costs."

In *Bailey vs. American Cent. Ins. Co.*, 8 Fed. R., 686 (Circuit Court, D. Iowa, Opinion by McCrary, C. J.), the Court said:

> "If the defendant has made a default, or if, having appeared, he has admitted the justice

of the plaintiff's claim, in either case there is no controversy" (p. 687.)

There can be no doubt that, between the 8th day of October, 1903, and the 24th day of October, 1903, the plaintiff could have applied for judgment, for the stipulation giving additional time to appear generally expired on October 8, 1903. That is the reason Mr. Burns stated in his affidavit that the plaintiff might apply for judgment and the defendant made the motion for a stay pending the appeal.

After the order of October 24th, the plaintiff could not apply for judgment on account of the *stay;* but the defendant was just as much in *default* as before, no extension of time to appear or answer having been granted.

If the relief from default in appearing (not in answering) in this order amounted to anything, without an extension of time to appear or answer, it was only for an instant, and the next instant the defendant was again in default, so that whether this order went into effect on October 24th, when it was signed, or on October 26th, when it was entered, in either event, the defendant was in default, when its attorneys filed the petition for removal on October 26, 1903.

The defendant claimed in the court below that this order did not go into effect until it was entered on October 26th. If the plaintiff had acted on this theory and had applied for judgment between the time of the signing of the order on October 24th and the time of its entry on October 26th, the defendant would undoubtedly have claimed that the plaintiff and his attorneys were

in contempt of court for violating the stay of proceedings contained in the order.

There can be no doubt that this order went into effect the instant it was granted, on October 24, 1903.

Robinson vs. Govers, 138 N. Y., 425-428-429.

Manchester vs. Herrington, 10 N. Y., 164-169.

May vs. Cooper, 24 Hun., 7-9.

McKee vs. Flaherty, 1 Law Bull., 14.

Hence if the relief from default in appearing (not in answering) contained in the order of October 24, 1903, amounted to anything, there being in it no extension of time to appear or answer, such relief from default expired, *at the very latest*, at midnight, October 24, 1903, and the defendant was again in default when the petition for removal was filed on October 26, 1903.

VII.

SOME LEADING CASES.

The Removal Act requires the defendant to file the petition for removal in the state court at the time, or any time before the defendant is required to answer or plead to the declaration or complaint of the plaintiff. This court has construed this to mean *as soon as the defendant is required to make any defense whatever in the state court*, so that, if the case should be removed, the validity of all his defenses may be tried and determined in the Circuit Court of the United States, and, therefore, that a petition for removal filed after the time at which

he is required to plead to the jurisdiction of the court *or in abatement of the writ*, is too late.

Martin vs. Baltimore & C. R. Co., 151 U. S., 673, 686.

Goldey vs. Morning News, 156 U. S., 518, 524.

Wabash Western R. Co. vs. Brow, 164 U. S., 271, 277, 278.

In *Goldey vs. Morning News*, 156 U. S., 524, 525, the defendant, a citizen of the state of Connecticut, was served with a summons in the state of New York. He did not, as in the case at bar, appear specially in the state court and move to have the service set aside, but on the 20th day after the service filed his petition for removal to the Circuit Court of the United States for the Eastern District of New York.

After the removal the defendant appeared specially in the Circuit Court of the United States and moved, upon affidavits, to set aside the service of the summons. In the opinion the Court said:

> "It has been held by this Court, upon full consideration, that the provision of this act, that the petition for removal shall be filed in the state court at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint,' requires the petition to be there filed at or before the time when the defendant is so required to file any kind of plea or answer, 'whether in matter of law, by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court *or in suspension or abatement of the particular suit*, or by plea in bar of the whole right of action,' because, as the Court said, 'Construing the provision now in question, having regard to the natural

meaning of its language and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court *as soon as the defendant was required to make any defense whatever in the court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States. Martin vs. Baltimore & Ohio Railroad,* 151 U. S., 673, 686, 687.

As the defendant's right of removal into the Circuit Court of the United States can only be exercised by filing the petition for removal in the state court before or at the time when he is required to plead in that court to the jurisdiction or in abatement, it necessarily follows that, whether the petition for removal and such a plea are filed together at that time in the state court, or the petition for removal is filed before that time in the state court, and the plea is seasonable filed in the Circuit Court of the United States after the removal, the plea to the jurisdiction or in abatement can only be tried and determined in the Circuit Court of the United States."

The Court in this case treated the motion to set aside the service of the summons as a plea in abatement.

In *Martin vs. Baltimore & Ohio Railroad,* 151 U. S., 673, 686, 687, the Court said:

"The defendant's petition for the removal of the case into the Circuit Court of the United States was not filed at the rules, either in March or April. But it was afterwards filed in and heard by the state court before the end of the April term. It was therefore filed at or before the time at which the defendant was required by the laws of the state to answer or plead to the merits of the case, but after the time at which he was required to plead to the

jurisdiction of the court, *or in abatement of the writ.*

Was this a compliance with the provision of the act of Congress of 1887, which defines the time of filing a petition for removal in the state court? We are of opinion that it was not for more than one reason. This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court to answer or plead to the declaration or complaint. These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of the law, by demurrer or in matter of fact, either by dilatory plea to the jurisdiction of the court *or in suspension or abatement of the particular suit* or by plea in bar of the whole right of action, *are said in the standard books on pleading to oppose or answer the declaration or complaint which the defendant is summoned to meet.*

"*Stephen on Pleading* (1st An. Ed.), 60, 62, 63, 70, 71, 239.

"*Lawson Pleading,* 36.

"The Judiciary act of September 24, 1789, Ch. 20, Sec. 12, requires a petition for removal of a case from a state court into the Circuit Court of the United States to be filed 'at the time of entering his appearance in such state court.' 1 Stat. 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. *Pullman Car Co. vs. Speck,* 113 U. S., 34; *Smith vs. Lyon,* 133 U. S., 315, 320. *In re Pennsylvania Co.,* 137 U. S., 451, 454; *Fisk vs. Henarie,* 142 U. S., 459, 467; *Shaw vs. Quincy Mining Co.,* 145 U. S., 444, 449.

Construing the provisions now in question, having regard to the natural meaning of its language and to the history of the *legislation*

upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States."

This language is quoted with approval in *Wabash Western Railway vs. Braw*, 164 U. S., 277, 278.

In the last case cited the service was on September 24, 1892, and the petition for removal was filed October 7, 1892. After the case was removed a motion was made to set aside the service.

In *Rosenthal vs. Coates*, 148 U. S., 142-147, the Court said:

> "Further, to sustain this removal would certainly violate the spirit of the removal acts which do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the federal court."

In *Olds. vs. City Trust, Safe Deposit & Surety Co. of Philadelphia*, 114 Fed. R., 975 (C. C. D. Mass., opinion by Lowell, J.), the Court said:

> "Moreover, it would seem to follow, under the defendant's contention, that it could await a decision by the state court on the plea in abatement, and accept the decision, if that was favorable, but remove the case to this court if the decision was unfavorable. This cannot be. The defendant is entitled, by a seasonable removal, to take the decision of this court on its plea in abatement, but the fact that its plea is to the jurisdiction does not enable it to experiment with the state court first and with the federal court afterwards."

See also upon this point:

Bragdon vs. Perkins-Campbell Co., 82 Fed R., 338.

Kidder vs. Ins. Co., 117 Fed. R., 997, 998.

Cleaver vs. Traders' Ins. Co., 40 Fed. R., 711.

VIII.

NO PRESENTATION OF PETITION AND BOND TO STATE COURT IN SESSION.

(THIRD GROUND IN MOTION TO REMAND, PRINTED RECORD, P. 96.)

No order from the state court was obtained upon the petition and bond for removal. The petition and bond were not presented to the state court. Judge Rogers of the state court approved the bond as to form and sufficiency of sureties, but he was not holding court at the time the petition and bond were presented, and approved the bond at chambers. The state court was not in session the day the bond and petition were presented and filed. (Printed Record, p. 3-6-97-98-102.)

The petition and bond for removal should have been presented to the state court in session. Their presentation to a justice of the state court at chambers and filing with the clerk were insufficient.

Williams vs. Massachusetts Ben. Assn., 47 Fed. Rep., 533.

La Page vs. Day, 74 Fed. Rep., 977.

Fox vs. Southern Ry. Co., 80 Fed. Rep., 945.

Shedd vs. Fuller, 36 Fed. Rep., 609.

Roberts vs. C., St. P., M. & O. Ry. Co., 45 Fed. Rep., 433.

In *Williams vs. Massachusetts Ben. Assn.*, 47 Fed. R., 533 (C. C. Nor. D. of N. Y. Opinion by Coxe, J.), the Court said:

> "This motion turns, therefore, upon the question whether or not the presentation upon the 27th of June, and the subsequent filing in the clerk's office, was a compliance with the federal statute. Is it sufficient to present the petition and bond, when no court is in session, to a judge of the state court sitting in his office, and subsequently to file them in the office of the clerk? Manifestly not! It is the 'state court' which is authorized to act upon the petition, and not a judge or a clerk of the state court. In the case of *Roberts vs. Railway Co.*, 45 Fed. Rep., 433, it was said:
>
> 'The petition should be presented to the state court, and opportunity given that court to act. In this case the petition was presented to the clerk of the state court, and filed by him, and a certified copy immediately made and given the defendant. The court never had its attention called to the petition. This is not the proper practice indicated by the statute granting removals from the state court, or recognized by the United States Supreme Court.'
>
> *Shedd vs. Fuller*, 36 Fed. Rep., 609; *Stone vs. State*, 117 U. S., 430, 6 Sup. Ct. Rep., 799; *Crehore vs. Railway Co.*, 131 U. S., 240, 9 Sup. Ct. Rep. 692.
>
> As the cause is still in the Supreme Court of the State of New York, this court has no jurisdiction to grant the motion."

In *La Page vs. Day*, 74 Fed. R., 977 (C. C. Nor. D. N. Y. Opinion by Coxe, J.), on April 18, 1896, the petition and bond for removal were presented to a justice of the state court, who approved the bond; the Court said:

> "Notwithstanding an occasional dictum to the contrary, it is conceded by the defendant that the petition and bond must have been pre-

sented to the court, the mere filing in the clerk's office of Franklin County being insufficient. The issue, then, is narrowed to the single question: *Was the court in session on the 18th of April?*"

The defendant produced proof that it was in session and thereby saved the case from being remanded.

In *Shedd vs. Fuller*, 36 Fed. Rep., 609 (C. C. Nor. D. of Ill. Opinion by Gresham, J.), the Court held that a filing of the petition and bond with the clerk of the state court is not sufficient, as the Court has a right to pass upon them, and said:

> "The presentation of a proper petition and bond to the state court for its action is a jurisdictional prerequisite. *Stone vs. South Carolina*, 117 U. S., 430. Motion to remand sustained."

In *Fox vs. Southern Ry. Co.*, 80 Fed., 945-948 (C. C. W. D. of S. C. Opinion by Dick, J.), the Court held that the cause must be remanded where it appears that the petition and bond were filed in the clerk's office of the state court in vacation, and there is nothing to show that they were ever presented to the *court in session*. The Court said:

> "The removable statute imposes a duty upon the state court to accept a sufficient petition and bond, and proceed no further in the cause against the petitioner. It is certainly courteous, reasonable, just and lawful that such court should have opportunity of performing its duty by considering and acting upon the application before it surrenders its original and concurrent jurisdiction, or before it is deprived of jurisdiction by the operation of paramount laws of the United States. A wise and just public policy requires federal courts, in the exercise of their rightful jurisdiction, to accord to state courts the most liberal and cor-

dial comity that is consistent with their legal duty in the enforcement of paramount national laws.

As I am of opinion that the facts and proceedings appearing in the transcript, and the principles of law above announced, are fully sufficient to warrant an order remanding this case, I have deemed it unnecessary to consider and determine other questions presented by counsel on the argument."

In *Roberts vs. C., St. P., M. & O. Ry. Co.*, 45 Fed. R., 433, (Opinion by Nelson, J.), the Court said:

"This is a motion to remand made by the plaintiff. The correct practice is indicated by Judge Gresham in *Shedd vs. Fuller*, 36 Fed. Rep., 609. The petition should be presented to the state court and opportunity given that court to act. In this case the petition was presented to the clerk of the state court, and filed by him, and a certified copy immediately made and given the defendant. The court never had its attention called to the petition. This is not the proper practice indicated by the statute granting removals from the state court, or recognized by the United States Supreme Court.

Motion to remand granted."

In *Railroad Co. vs. Koontz*, 104 U. S., 5-15, the Court said:

"The state court must stop when the petition and bond are presented," etc.

This implies that the presentation must be to the court.

IX.

RES ADJUDICATA.

The court below should not have entertained the motion to set aside the service of the summons, arising upon the order to show cause.

This motion was made upon the affidavits of Mr. J. C. Stubbs and Mr. Maxwell Evarts, which are substantially the same as the affidavits of the same persons, used by the defendant in support of its motion in the state court, to set aside the service of the summons. Compare the affidavits of these persons used in the state court and found in the record on removal (Printed Record, pp. 35, 36 and 68), with their affidavits on the motion in the federal court. (Bill of Exceptions, Printed Record, pp. 94-103.)

The record shows that the motion came on for hearing in the state court at a special term held the 9th day of June, 1903, and after the defendant had presented the affidavit of Mr. Stubbs and plaintiff had presented affidavits in opposition, the court, at the request of the defendant, adjourned the hearing of the motion to a special term to be held July 11th, 1903, and gave the defendant leave to serve additional affidavits by July 1st, 1903. The defendant did serve additional affidavits and the plaintiff also presented additional affidavits. The affidavits on each side went into the facts exhaustively, the defendant presenting four affidavits and the plaintiff twelve and a certificate of the Secretary of State of the State of New York.

The affidavits on the part of the plaintiff showed, among other things, that the plaintiff is a

resident of New York (Printed Record, p. 61); that the cause of action arose in New York (Printed Record, pp. 54, 55, 60, 61, 62, 63, 64, 65); that the defendant has property in New York (Printed Record, pp. 31, 32, 33, 34-58); that the defendant has, and at the time of the service of the summons had an office at 120 Broadway, New York City (Printed Record, pp. 48, 49, 50), and that the summons was served upon J. C. Stubbs, a director of the defendant, at that office (Printed Record, pp. 47, 48). On September 28, 1903, the state court made an order denying the defendant's motion to set aside the service with $10 costs, and without granting the defendant any leave to renew the motion, which order was entered October 2, 1903, and has never been reversed or set aside (Printed Record, p. 29).

The Circuit Courts of the United States do not sit as courts of errors to review the decisions of the state courts. *Whether those decisions are right or wrong*, these United States Courts have no power to reopen questions once passed upon and decided by the state courts.

In *Duncan vs. Gegan*, 101 U. S., 810, 812, the Court said:

> "The transfer of the suit from the state court to the Circuit Court did not vacate what had been done in the state court previous to the removal. The Circuit Court, when a transfer is effected, takes the case in the condition it was when the state court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the state court would have had if the suit had remained there. It takes the case up where the state court left it off.
>
> Before the suit of *Gegan vs. Bowman and Duncan* was removed to the Circuit Court,

> the rank of the appellant's mortgage had been finally settled by the judgment of the Supreme Court of the state on appeal. That was no longer an open question between the parties to that litigation. All the court from which the removal was afterwards made could do was to distribute the proceeds of the sale of the property in accordance with the directions of the Supreme Court. It had no power whatever to change the order of priorities as settled by the Appellate Court."

In *Loomis vs. Carrington,* 18 Fed., 97-99 (E. D. Mich.), the Court, Brown, J., said:

> "The rule is believed to be well established that in all cases of removals from state courts this court will not act as a court of errors, but will take the case precisely as it finds it, accepting all its decrees and orders as adjudications in the cause. A motion for a rehearing of a similar motion in the state court is only another name for an appeal, and should be denied, unless it is made for reasons which did not appear upon the previous argument. (*Duncan vs. Gegan,* 101 U. S., 810; *French vs. Hay,* 22 Wall., 231; *Brooks vs. Farwell,* 4 Fed. R., 166; *Wetherin vs. Continental Ry. & Trust Co.,* 11 Fed. R., 689; *Milligan vs. Lalance & Grosjean, Man. Co.,* 17 Fed., 465; *Smith vs. Schoed,* 6 Fed. R., 455.)"

The case of *Bragdon vs. Perkins-Campbell Co.,* 82 Fed. R., 338 (C. C. W. D. Pa. Opinion by Acheson, C. J.), was precisely like the one at bar. In that case it was held that where a non-resident defendant, sued in the state court, invokes the judgment of that court by a motion to set aside the service of the summons, he is concluded by the state court's decision, and cannot renew the motion in the federal court, after removing the cause, on substantially the same evidence. In the opinion the Court said:

"Now, undoubtedly it was open to the defendant, by promptly filing a petition for the removal of the case, to have obtained the judgment of this Court upon the question of the validity of the service. *Railway Co. vs. Brow*, 164 U. S., 271; 17 Sup. Ct., 126. But the defendant did not pursue the course it was at liberty to take, of declining to subject itself in any way to the jurisdiction of the State Court. It invoked the judgment of that court upon the question of the validity of the service. Certainly so long as the cause remained in the State Court, that question was within its cognizance. The proper determination of the question depended upon what the facts were. At the defendant's instance an issue of fact was raised in the State Court and submitted to its determination. The decision was against the defendant. Is the same question to be retried here upon substantially the same evidence? That, I think, is not permissible. This is not a court of review. The general rule is that upon the removal of a cause, the Circuit Court takes the case as it finds it, accepting the decree and orders made by the State Court as adjudications in the cause. *Loomis vs. Carrington*, 18 Fed., 97. As was said by Chief Justice Waite in *Duncan vs. Gegan*, 101 U. S., 810, 812, the Circuit Court 'takes the case up where the State Court left it off.' The present case, I think, falls within this general rule. In *Allmark vs. Steamship Co.*, 76 Fed., 615, where the defendant removed the cause after denial by the State Court of the defendant's motion to set aside the service of the summons, Judge Benedict held that the defendant was concluded by the decision of the State Court. And now, July 7, 1897, the rule to show cause why the service of the writ of summons should not be set aside, etc., is discharged, with leave to the defendant to plead within 30 days."

In *Allmark vs. Platte S. S. Co.*, 76 Fed. R., 615 (C. C. E. D. New York, Opinion by Benedict, J.),

the State Court had denied a motion to set aside the service of the summons, and the defendant renewed the motion in the Federal Court, but the renewed motion was denied, the Court saying:

> "In my opinion the defendant is concluded by the decision of the State Court made upon its own request, before the cause was removed. This Court takes the cause in the condition in which it was left by the State Court."

In *Denison vs. Shawmut Min. Co.*, 124 Fed. R., 860 (C. C. W. D. New York, decided August 6, 1903, opinion by Hazel, J.), the Court said:

> "This is a motion for rehearing upon a decision of the State Court setting aside an attachment prior to removal of the cause to this Court. It is uniformly held that the Circuit Court of the United States, to which a cause is transferred from the State Court, will not review any questions determined by that Court before removal; nor, indeed, will it listen to a motion for rehearing of a similar motion in the State Court, as such hearing is held to be merely another name for an appeal. *Loomis vs. Carrington* (C. C.), 18 Fed. 97-99; *Cleaver vs. Traders' Ins. Co.* (C. C.), 40 Fed., 711. All interlocutory questions decided while the cause was in the State Court are *res adjudicata* so far as this Court is concerned. *Brooks vs. Farwell* (C. C.), 4 Fed., 166, 2 McCrary, 220; *Milligan vs. Lalance & Grosjean Mfg. Co.* (C. C.), 44 Fed., 449; *Allmark vs. Platte S. S. Co.* (C. C.), 76 Fed., 615. It is undoubtedly true that the power to entertain a motion for rehearing may be exercised by this Court after a transfer of the cause from the State Court, (*Garden City Mfg. Co. vs. Smith*, Fed. Cas. No. 5,217, 1 Dill., 305), but such power should only be exercised in strict conformity with prevailing practice of the State Court from which the cause was removed. Now, it is quite clear from the preliminary discussion had upon this motion for leave to reargue that

an exhaustive hearing was had upon the merits before Judge Childs. No new facts are disclosed here. The entire claim to the right of rehearing is based upon the erroneous disposition of the motion in the State Court. The prevailing practice in that court is not to allow a rehearing unless it is manifest that all the facts were not presented to the Court upon the decision of the original motion, or unless some facts were overlooked which, through inadvertence or mistake, led the Court into error. *Van Wagener vs. Royce* (Sup.), 21 N. Y. Supp., 191; *The Matter of Crane*, 81 Hun., 96, 30 N. Y. Supp., 616.

No ground is here shown which would justify this Court in granting a rehearing. The motion is therefore denied."

In *Brooks vs. Farwell*, 4 Fed. R., 166 (C. C. D. Col.), the Court said:

"As to all questions that are passed upon in the State Court before the removal of the cause, they are fully and finally determined, so far as this Court is concerned, and can only be reviewed in the Supreme Court of the United States, if there be error in them."

We have been able to find but one case in the books where the Circuit Court of the United States made an order at variance with an order made by the State Court before removal of the action, and that case is *Miner vs. Markham*, 28 Fed. Rep., 387. In that case the motion to set aside the service of the summons was denied by the State Court, *"but without prejudice to the right of the defendant to renew the motion in that or any other court in which the case should be thereafter pending."* (Page 388.)

The Court in granting the motion in the Federal Court expressly based the decision on this leave granted in these words: *"and the motion made in*

the State Court having been denied without prejudice to a renewal of the same, the defendant has not waived his privilege, and can assert it here with the same force and effect as if the suit had been brought and the motion made in this court in the first instance." (Page 395.)

In the court below, the defendant cited the case of *Kern vs. Huidekoper,* 103 U. S., 485, but that case is not in point, for the reason that it was within the jurisdiction of the Federal Court, not of the State Court, to decide whether the case was removable, and the defendant and the Federal Court were not bound by the decision of the State Court, made without jurisdiction of the question, that the cause was not removable. It cannot be denied by the defendant that the State Court had jurisdiction in the case at bar to decide the motion made by the defendant to set aside the service of the summons.

In the court below, the defendant cited the case of *Bryant vs. Thompson,* 27 Fed. Rep., 881, where the Court held that if a proper showing had been made it could exercise the same power to set aside an order made by the State Court before removal of the action to the Federal Court, that the State Court could have exercised if the suit had not been removed. In that case the question before the Court was whether a receiever appointed by the State Court should be discharged.

This kind of a motion is the most favorable for the contention of the defendant, for the reason that a receiver is an officer of the Court, acting under the supervision and direction of the Court; he is a person in whom the Court should be able to place confidence and on whom great responsibilities are frequently placed.

A slight change in the circumstances of a receiver, or in his conduct, or in the estate intrusted to him, will frequently suffice to induce a court to discharge him. In this case the receiver was not selected by the Federal Court and there was not, therefore, that personal knowledge on the part of the Federal Court concerning the qualifications of the receiver and the confidence in his integrity which may be supposed to have existed if the Federal Court had selected him. Yet, with this handicap against the receiver, the Federal Court refused to grant the motion to discharge him. The Court said:

> "Suppose a motion were made in this court to discharge a receiver of its own appointment, and suppose the Court had refused to grant the application, would it entertain the same motion a second time, and without any additional evidence or showing, grant the application? It certainly would not.
>
> Without some most cogent reason the Court would not set aside its own solemn judgment, entered into after due consideration and full argument. Now, it appears that this same motion to discharge the receiver was made before the state district judge. No additional evidence to support the motion has been adduced before us. We shall treat the judgment of the state judge as we would our own order." (Pp. 882-883.)

Now apply the reasoning of this—the most favorable case for the defendant to be found in the books—to the case at bar.

Before the decision by the State Court of the motion made by the defendant to set aside the service of the summons in the case at bar, there was the most elaborate presentation of facts and discussion on each side. One hearing on the motion was had

on June 9, 1903, and each side presented its affidavits. At that time, after each side had presented its papers, the defendant requested the Court to adjourn the hearing and give it an opportunity to serve additional affidavits. The Court thereupon granted its request and adjourned the hearing of the motion to a special term held July 11, 1903, and made an order giving the defendant until July 1, 1903, to serve additional affidavits. Under this order the defendant served three affidavits in addition to the original affidavit of J. C. Stubbs, to-wit: the affidavits of Mr. Maxwell Evarts, Mr. Isaac E. Gates, a former director and vice-president of the defendant, and Mr. Watkins, who had been transfer agent of the defendant in New York City. (Printed Record, pp. 35-36-37-38-39 and 68.)

The plaintiff presented twelve affidavits and the certificate of the secretary of state. (Printed Rec., pp. 47 to 67.) The affidavits of the respective parties were presented and the matter fully argued to the State Court. After this thorough preparation and discussion by the parties, the Court took the motion under advisement, and on September 28, 1903, the State Court denied the defendant's motion with ten dollars costs, *and did not grant any leave to renew the motion.*

Now the defendant renews the motion in the Federal Court on substantially the same showing made in the State Court. If the cause had remained in the State Court, and the defendant had there renewed the motion, would the defendant have stood any chance whatever of having the motion granted? Undoubtedly not; and no one knows better than defendant's counsel that they would not have renewed the motion in the State Court.

Suppose again, that this action had been commenced in the Federal Court, and the same motion had been made, the same proceedings had been had and the same decision had been made on September 28, 1903, in the Federal Court as was made in the State Court. Would the defendant have renewed the motion on November 10, 1903, or, if it had, would the Court have entertained it? It is unnecessary to say that under those circumstances the defendant's counsel would not have thought of renewing the motion.

It is plain enough that what defendant's counsel wanted the Court below to do, and what the Court below did, was to act as a court of errors and review the decision of the State Court.

In *Oglesby vs. Attrill*, 14 Fed. R., 214, 215, the Court said: "Solicitor for defendant also moves the Court that the substituted service of process heretofore made in the case be set aside and annulled. I have examined the record, and I find that this question has been passed upon and adjudicated by the district judge sitting in this court in the early stage of the case; 12 Fed. Rep., 227. This decision is not open to review to any other judge sitting in this court in the same case."

In *Cole Silver Mining Co. vs. The Virginia and Gold Hill Water Co.*, 1 Sawyer (U. S.), 685-689, the Court said:

> "The injunction, although preventive in form, is undoubtedly mandatory in fact.
>
> It was intended to be so by the circuit judge who granted it, and the objection which is now urged for its dissolution was presented to him and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit

judge possesses, as already stated, equal authority with myself in the Circuit, and it would lead to unseemly conflicts if the rulings of one judge upon a question of law should be disregarded or be open to review by the other judge in the same case."

In *Hayes vs. Dayton*, 20 Fed. R., 690 (Circuit Ct. S. D. N. Y.), Judge Coxe said:

"So long as this decision is undisturbed by the only tribunal which has a right to review it, it must remain the law governing the case. The spectacle of one court overruling or reversing another court of co-ordinate jurisdiction in the same circuit would certainly be an anomolous one. It would be without precedent and would lead to inextricable confusion."

A motion can only be repeated on new grounds, and not on mere additional or cumulative evidence.

Ray vs. Connor, 3 Edw. Ch., 478.

In the opinion the Vice-Chancellor said:

"One objection to the granting of the present motion is, that it is made upon the same ground and for the same purpose as the former motions, which have been denied without leave to renew. The objection appears to be well taken. A motion cannot be repeated except on some new ground; and affidavits which merely present additional or cumulative evidence on the points before presented are not to be considered as showing new grounds for the motion: *Hoffman vs. Livingston*, 1 J. C. R., 201; *Dunham vs. Winans*, 2 Paige's C. R., 24; and such is the present case. The affidavits now read are but an amplification of some of the grounds of the two former motions. There is nothing new presented, except it be additional evidence of facts which he then wanted to have an opportunity of introducing in his defense, and which was then, under the circumstances, denied him. He may suffer great injustice by this denial, but there must be an end to every litigated suit."

A motion once heard and decided cannot be repeated except on new grounds. It is not enough that additional evidence is offered by the affidavits.

Hoffman vs. Livingston, 1 John's Ch., 211.

The Chancellor said in the opinion:

> "The former motion, on the same point was heard, discussed and decided; and there would be great vexation if the same motion can be repeated. But it is said that the affidavits present new matter. They are intended, however, only as additional evidence of the matter urged in support of the former motion."

A motion made by the defendant to have the complaint made more definite and certain, and, in default of that relief being granted, for a bill of particulars, having been denied without any leave being given to renew it, a motion was made by him for a bill of particulars in reference to the second cause of action mentioned in the complaint herein.

Held, that the adjudication upon the prior motion was a bar to the making of the present motion.

Klumpp vs. Gardner, 44 Hun., 515.

In *Melville vs. Matthewson,* 49 N. Y. Super. Ct. (17 Jones & S.), 388-391, the Court said:

> "Aside from a few additional but wholly immaterial facts concerning which there is not even the pretense that they had been discovered since the first motion, there were no facts presented on the second motion which were not presented on the first. * * * Under such circumstances failure to ask for and obtain leave to renew, is ground for reversal." (Gen. Term Dec.)

The rule that a motion once heard and determined cannot be renewed without leave, applies to a motion founded on an irregularity.

First Nat. Bank vs. Hamilton, 50 How. Pr., 116.

In the opinion the Court says: "Counsel for the plaintiff objects, preliminarily, that the error of a special term cannot be corrected by a motion made at another, but can only be remedied by an appeal. I confess I do not see how the objection can be overcome. The points now made have been determined, and until reversed by a superior tribunal such determination is conclusive upon the parties. It is well settled that a motion, once heard and determined, cannot be renewed without leave, and the reason of that rule applies with full force. * * * There must be an end of discussion and litigation in the same tribunal at some point, and practice and common sense insist that a decision of the question shall end proceedings before and in the tribunal which decides. A contrary conclusion leaves parties the helpless subjects of endless litigation." (Pages 118 and 119.)

In *Mahr vs. Nor. Union Fire Ins. Society,* 127 N. Y., 452-459, the Court said:

"The plaintiffs did not appeal from the order of the Court requiring Kelly to be brought in, and as long as it remained in force it was an adjudication, establishing as the practice, if not the law, of the case that Kelly was a necessary party."

The decision of a vice-chancellor dissolving an injunction is conclusive between the same parties on any application for its revival on the same state of facts; or on a new state of facts, except upon leave first had to apply anew.

Banks vs. The American Tract Society, 4 Sandf. Ch., 438.

In *Day vs. Mertlock,* 87 Wis., 577-582, the Court said: "The first and second motions are based substantially on the same grounds. The first motion was denied with costs and absolutely, without any leave of renewal, and therefore the first order was *res adjudicata;* and the

second motion should have been denied on that ground. *Branger vs. Buttrick*, 28 Wis., 454; *Hoppe vs. C., M. & St. P. R. Co.*, 61 Wis., 367; *Webster vs. Oconto Co.*, 47 Wis., 226."

To the same effect:

Rogers vs. Hoenig, 46 Wis., 361-362.

"As a rule of practice, it is well settled that leave to renew a motion after its decision must be granted, if at all, at the time of such decision, and be a part and qualification of the order on the first motion."

Webster vs. Board of Supervisors, 47 Wis., 228.

An order made on an interlocutory motion is as much an adjudication and is as binding as a final judgment.

Dwight vs. St. John, 25 N. Y., 203-206;
Williams vs. Barkley, 165 N. Y., 48-54;
Culross vs. Gibbons, 130 N. Y., 447-454;
Brown vs. Mayor, 66 N. Y., 385-390.

In *Culross vs. Gibbons, supra*, the Court said;

"It is a well-established rule that where a matter has been submitted to an authorized judicial tribunal, its decision thereon is final between the parties, until it has been reversed, set aside or vacated; and the rule of *res adjudicata* applies to all judicial determinations, whether made in actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. (*People ex rel. vs. Barnes*, 114 N. Y., 317; *Leavitt vs. Wolcott*, 95 id., 212; *People ex rel. vs. Hall*, 80 id., 117; *Demarest vs. Darg*, 32 id., 281; *Sibley vs. Waffle*, 16 id., 180; *Supervisors vs. Briggs*, 2 Denio, 33.)" (P. 454.)

In *Brown vs. Mayor, supra*, the Court said:

"When a matter in controversy between parties has been submitted to a competent judi-

cial tribunal, its decision thereon is final between the parties until it has been reversed, set aside or vacated; and the rule of *res adjudicata* applies not only to the judgments of courts, but to all judicial determinations, whether made by courts in ordinary actions or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. It applies not only to judgments rendered after a litigation of the matter in controversy, but to judgments rendered upon default or confession. (*Gates vs. Preston*, 41 N. Y., 113; *Newton vs. Houck*, 48 N. Y., 676.)" (P. 390.)

In the court below the defendant claimed that the defendant's motion in the State Court to set aside the service of the summons was not decided and determined by the State Court at the time the petition for removal was filed, for the reason that an appeal from the order of the State Court, denying the motion, had been taken and was pending undetermined at the time the petition for removal was filed.

If the defendant did not abandon its appeal to the Appellate Division of the State Court from the order denying the defendant's motion to set aside the service of the summons at the time the petition for removal was filed, that of itself would defeat a removal.

If that appeal was not abandoned, the only court in which it could be considered was the Appellate Division of the Supreme Court of the State of New York, to which it was taken.

As said in *Chicago, I. & N. R. R. Co. vs. Minn. & N. W. R. Co.*, 29 Fed. R., 337, the case cannot be pending in two courts at the same time.

The appeal could not be transferred from the

Appellate Division of the State Court to the Circuit Court of the United States and there heard. The Circuit Court of the United States is not an Appellate Court. Section 4 of the Act of March 3, 1891, Chapter 517, contains the following: "and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts." *If the* appeal could be transferred to the Circuit Court for hearing, why did not the defendant notice the appeal for argument in that court, after the filing of the record on removal, instead of making a new motion on new affidavits?

The making of the new motion was not permissible if an appeal from the order made in the State Court could be heard.

If defendant contends that the appeal was not abandoned, it is an admission that the case is still in the State Court. If the appeal was abandoned, the order appealed from is in the same condition as though it had never been taken.

An appeal from an order or judgment and a stay of proceedings pending such appeal do not suspend the order or judgment or affect its validity or effect.

Sixth Ave. R. Company vs. Gilbert Elevated R. Co., 71 N. Y., 430;

Genet vs. The President, Managers & Co. of the Del. & Hud. Canal Co., 113 N. Y., 472;

Hovey vs. McDonald, 109 U. S., 150-160-161;

Knox County vs. Harshman, 132 U. S., 14-16.

The appeal from the order in question was taken under Title IV of Chapter 12 of the Code of

Civil Procedure. This title includes Sec. 1351, which contains the following:

> "Security is not required to perfect the appeal; but, except where it is otherwise specially prescribed by law, *the appeal does not stay the execution of the judgment or order appealed from;* unless the court in or from which the appeal is taken, or a judge thereof, makes an order directing such stay."

An appeal that does not even amount to a stay cannot suspend the order appealed from.

X.

DID THE DEFENDANT APPEAR GENERALLY?

If this Court should hold that Section 421 of the Code of Civil Procedure does not do away with the old rule concerning what is sufficient to constitute an appearance, we press upon the consideration of the Court the acts of the defendant mentioned in the 17th, 18th, 19th, 20th, 21st and 22nd assignments of error.

Several of these acts, if not all of them, under the rule which obtains in most states and in the courts of the United States, were sufficient to constitute a general appearance on the part of the defendant.

The defendant in the notice of motion in the State Court did not specify the irregularities complained of in the service of the summons, and after stating in the notice that the motion will be for an order setting aside the service of the summons, the defendant states that the motion is *"for such other or further order as may be proper, with costs of motion."* The defendant having asked for an order

setting aside the service of the summons, the "other or further order as may be proper" asked for must be something different or in addition to the setting aside of the service of the summons, and the defendant, not having specified what other or further order it deems proper, left it to the judgment of the Court to decide what other or further order may be proper. The defendant not having limited the motion to its objection to the jurisdiction of the Court, and to its claim that the service of the summons was defective, and having asked for such other or further order as may be proper, and having left it to the judgment of the Court to decide what was proper, made a general appearance under the usual rule.

Then the obtaining of the stipulations from the plaintiff's attorneys, in this view of the case, should be considered an appearance in the case.

Under the words "*or for such other relief as may be just,*" in the notice of motion for a stay, the defendant obtained an order from the state court on October 24, 1903, staying (not proceedings under the order appealed from) *all proceedings* on the part of the plaintiff pending the appeal and until ten days after the decision thereof, except the taking of plaintiff's deposition *and relieving the defendant from its default in appearing.* This, under the old practice, would also be a general appearance.

It is respectfully submitted that the orders and judgment of the court below should be reversed, and the case should be remanded to the State Court, whence it came.

JAMES G. FLANDERS,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1904.
No. 460.

HIRAM REMINGTON,
Plaintiff in Error,
vs.
CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

I.

The "Memorandum in opposition to motion to advance case unless oral argument is allowed" of defendant in error, contains on page 2 the following:

> "The bill of exceptions was presented to and signed by the Judge, without any notice to the defendant in error of such presentation. If notice of such presentation had been given, the bill of exceptions would have been very different and easier to understand."

This statement is misleading and unfair.

The bill of exceptions was settled and signed strictly in accordance with the rule of court. A proposed bill of exceptions was served on the defendant's attorneys on the 2nd day of September, 1904;

no amendments thereto have ever been served and the time for so doing has never been extended. Under the rule, if amendments are not served within ten days after the service of the proposed bill, the bill is taken as agreed to and is signed by the judge without notice. On September 16th, 1904, the bill of exceptions was signed upon the presentation of affidavits made by Mr. John N. Carlisle, one of plaintiff's attorneys, verified September 8th, 1904, and September 13th, 1904, respectively, showing the service of the proposed bill of exceptions on defendant's attorneys, on the 2nd day of September, 1904, and that on September 13th, 1904, no amendments had been served and the time for serving them had not been extended. The said affidavits of Mr. Carlisle and two other affidavits, showing among other things, the rules of the court relating to this matter, have been filed in this court and are printed as an appendix to this brief.

II.

The defendant in error, in the first point of its brief, contends that an appeal to this court from a Circuit Court under the 5th section of the Court of Appeals Act (26 U. S. Stat., 826), is never allowed under the present practice unless the question of jurisdiction of the lower court is a question of its jurisdiction as a court of the United States and not a question of its jurisdiction under its general authority as a judicial tribunal. To this we agree. The question raised by the plaintiff's motion to remand and by his objections to the hearing and decision of the motion or order to show cause, why the service of the summons should not be set aside,

was whether the state or the United States Court had jurisdiction of the suit. The plaintiff contended that the suit had not been properly removed from the state court to the federal court, and the federal court was therefore without jurisdiction to hear and determine the cause, for several reasons plainly and distinctly stated. (Bill of Exceptions, Printed Record, pp. 95, 96 and 97; see first brief, pp. 15, 16 and 17.)

Among these reasons were the following:

(1) The defendant had waived and was estopped from asserting any right it may have had to remove said cause from the state court to the Circuit Court of the United States, by reason of the fact that the defendant had taken certain proceedings in the state court, specifically set forth in the first ground of the motion to remand.

(2) The petition for the removal of the cause from the state court to the federal court was not filed in the state court at the time, or any time before the defendant in said cause was required by the laws of the state or by the rule of the state court in which the suit was brought, to answer or plead to the declaration or complaint of the plaintiff. (Second ground of motion to remand, first objection to hearing of motion to set aside the service of summons.)

(3) "The said petition for removal was and is insufficient in law and according to the statute and practice." (Fourth objection to hearing of motion to set aside the service.)

(4) "The said petition for removal and the bond filed therewith were not presented to said state court." (Third ground of motion to remand.)

(5) "The Circuit Court of the United States in and for the Northern District of New York is without jurisdiction to hear and determine the cause." (Fourth ground of motion to remand.)

(6) "This court (the court below) has no jurisdiction to hear, consider or decide said motion or order to show cause or to do anything in said action except to remand the same to the state court." (Second objection to hearing of motion to set aside the service.)

The plaintiff took the position that the state court *had* and the United States Court had *not* jurisdiction of the action. The jurisdiction of the federal court was attacked, not upon "its general authority as a judicial tribunal," *but upon its authority as a court of the United States as contradistinguished from the State Court.*

It is true that in *Powers vs. Chesapeake & Ohio Railway Company*, 169 U. S., 92, 98, the Court said:

> "The existence of diverse citizenship or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. *Manchester Etc. Railway vs. Swan*, 111 U. S., 379. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is in the words of Mr. Justice Bradley 'but modal and formal,' and a failure to comply with it may be the subject of waiver and estoppel."

Nevertheless in the same case, the Court held that:

> "A judgment of the Circuit Court of the United States against a party contending that the court has no jurisdiction because the case has

not been duly removed from a state court, may be reviewed as to the question of jurisdiction by this court, upon writ of error directly to that court under the act of March 3, 1891, c. 517, Sec. 5." (Headnote.)

The point made was that the petition was filed too late.

In the opinion the Court said:

"In the Circuit Court of the United States, the plaintiff contended that the court had no jurisdiction to entertain the case and to render the final judgment complained of, because the case had not been duly removed into the court from the state court in which it had been commenced.

"The question thus presented, was not, as in *Smith vs. McKay*, 161 U. S., 355, whether a suit, of which the Circuit Court of the United States was admitted to have jurisdiction, was cognizable on the common law or on the equity side of the court; but the question was whether the Circuit Court of the United States had any jurisdiction whatever of the case. The jurisdiction of the Circuit Court of the United States was thus in issue, and the question of its jurisdiction having been duly certified, the case was rightly brought from the Circuit Court of the United States directly to this court, under the act of March 3, 1891. c. 517, Sec. 5, upon the question of jurisdiction only. 26 Stat., 827." (Page 96.)

The question was not passed *sub silentio* in the above case. *The question was raised and was discussed and decided in the opinion.*

Before deciding whether to take the case at bar to this court or to the Circuit Court of Appeals, it was, of course, necessary to consider the authorities with great care. We knew that the question as to the proper forum was a most important and vital one

for our client, for we knew that if we should make a mistake in taking the case to this court and the writ of error should be dismissed, the six months in which a writ of error to the Circuit Court of Appeals could be sued out, would, by that time, have expired. Having found the above Powers case, where this precise question was raised and discussed and decided by the court without dissent, we relied and we think *we had a right to rely* upon the authority of that case to sustain our writ of error as we have taken it; and we could not do otherwise than follow the rule laid down by this court in that case.

We relied and we think we *had a right to rely* upon the case of *Shepard vs. Adams,* 168 U. S., 618, as authority for a direct appeal to this court where the question in the court below relates to the validity of the service of process on the defendant.

In this case, the question was not passed *sub silentio,* but was raised, discussed and decided. In the opinion the Court said:

> "This case is brought here, under Section 5 of the act of March 3, 1891, as one involving a question of the jurisdiction of the District Court of the United States for the District of Colorado; and the first contention we have to meet is that of the defendant in error, that the case is not really within the meaning of that section of said act, but presents only the case of an alleged error in the judgment of the District Court, redress for which should have been sought in the Circuit Court of Appeals. It is said that the question of whether or not the District Court acquired jurisdiction by a proper service of process is not one which involves the jurisdiction of the court, within the

meaning of that term as used in the act; and the case of *Smith vs. McKay*, 161 U. S., 355, is cited as sustaining such a view.

"In the case referred to, the respective parties were duly in court and the subject-matter of the controversy was within the jurisdiction of the court; but it was claimed by the defendant that the plaintiff, instead of asserting his right by a bill in equity, should have proceeded by an action at law, which afforded an adequate remedy. The court below was of opinion that the plaintiff was not wrong in seeking his remedy in equity. Thereupon the defendant brought the case here directly, contending that the case involved the question of the jurisdiction of the Circuit Court, within the meaning of Sec. 5 of the act of March 3, 1891. But it was held here that the court, in deciding that the plaintiff's remedy was in equity and not at law, was in the lawful exercise of its jurisdiction, and that, if the court was wrong in so deciding, it was an error for which the defendant should have sought his remedy in the Circuit Court of Appeals.

"The present case differs from *Smith vs. McKay* in the essential feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court." (Page 622.)

This Court entertained jurisdiction in at least three similar cases, to-wit:

Goldey vs. Morning News, 156 U. S., 518.

Conley vs. Mathieson Alkali Works, 190 U. S., 406.

Geer vs. Mathieson Alkali Works, 190 U. S., 428.

Each of these cases was commenced in the Supreme Court of the State of New York, and each was removed by the defendant to the Circuit Court of the United States, and there the defendant moved to set aside the service of the summons. This motion was granted in each case and each case was taken by appeal or writ of error directly to this court and jurisdiction exercised by this court. The above cases cover all the jurisdictional questions arising in the case at bar, viz: proper removal and proper service.

To overcome the force of the foregoing authorities, the defendant cites:

Louisville Trust Co. vs. Knott, 191 U. S., 225.

Bache vs. Hunt, 193 U. S., 523.

Courtney vs. Pradt, 196 U. S., 89.

A glance at these cases is sufficient to show how greatly they differ from the case at bar and the authorities we have cited.

In the *Louisville Trust Co.* case, the question was one of priority between a receiver appointed by a federal court, and a receiver appointed by a state court, depending upon principles of comity, and was not properly speaking a question of jurisdiction at all.

In *Bache vs. Hunt,* the question decided by the Circuit Court was as to the right of a receiver to be reimbursed for moneys paid by him to discharge certain underlying liens. In the opinion the Court said:

> "The established rules of practice as to bringing in parties to ancillary or *pro inter-*

> *esse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves were alone involved." (Page 525.)

In *Courtney vs. Pradt,* the Circuit Court decided that the suit "could not be maintained against the foreign executor in the state court, nor in the federal court." This Court said in the opinion:

> "The case was dismissed for want of jurisdiction over it, *as a suit against a foreign executor, in the courts of Kentucky.*"

The opinion further says:

> "It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was lack of jurisdiction in the federal courts *as contradistinguished from the state courts.*"

The Court also says:

> "No single and definite issue as to the jurisdiction of the Circuit Court as a federal court is presented."

In the case at bar the motion to remand makes a most definite issue as to the jurisdiction of the federal court.

Referring to *Shields vs. Coleman,* 157 U. S., 168, the defendant's brief, on page 13, says:

> "The Shields case is relied on by the plaintiff in error as showing *his right* to come direct to this court in the case at bar."

This is a mistake. We cite the Shields case not for the purpose of showing our *right* to come to this court, but the *method* of coming. It is included among the cases cited by us for the purpose of showing that the certificate concerning the jurisdictional question is sufficient.

III.

On page 22 of the brief for the defendant in error, counsel makes two short quotations from the judgment and from the order allowing the writ of error, and then says:

> "These citations from the record are relied on by the plaintiff in error as rendering unnecessary the certificate as to jurisdiction required by the act of Congress and the practice of this court."

This statement of counsel is no more candid than his statement concerning the bill of exceptions. We do not understand why he should say that we rely upon these two short quotations, when on pages 33, 34, 35, 36, 37, 38 and 39, of our first brief, in the point entitled, "Certificate Concerning the Jurisdictional Question," we have made very extensive quotations from the judgment, the bill of exceptions, the petition for writ of error and the order allowing the writ of error, and then say:

> "No further certificate concerning the question of the jurisdiction of the court below in issue is necessary,"

Citing five decisions of this court. The jurisdictional question in the case is plainly and definitely stated in the recitals in the judgment, quoted on pages 33 and 34 of our first brief. In the bill of exceptions on pages 93, 94, 95, 96 and 97, of the printed record, the issue concerning the jurisdiction of the court below is plainly set forth. The bill of exceptions shows that the motion to remand was denied, the motion to set aside the service of the summons was granted and thereupon the action

was dismissed for want of jurisdiction of the defendant, and the certificate to the bill of exceptions says:

> "And I hereby certify that said bill of exceptions contains all the proceedings had in this court in said cause and all the evidence and proofs produced in said proceedings, and I further certify that the jurisdiction of the court is in issue in said case and is the only question arising in said case." (Printed Record, p. 105.)

The bill of exceptions shows that there was no conflict in the proofs produced in the court below, and that the jurisdictional question to be decided was simply a question of law, arising upon undisputed facts.

The plaintiff's petition for writ of error, a large part of which is quoted on pages 35, 36 and 37, of our first brief, sets forth in detail the question of jurisdiction raised and decided in the court below. The order allowing the writ of error, quoted from on pages 38 and 39 of our first brief, contains among the recitals, the following:

> "And the jurisdiction of the court being in issue in this case, and the only question arising in said action, and the only question tried and decided by this court therein being the question of the jurisdiction of the court."

This order adopts the statement concerning the jurisdictional question, contained in the petition. After the lengthy recitals contained in this order, it concludes as follows:

> "It is ordered and considered by the court that said writ of error to the Supreme Court of the United States from said orders and said final judgment dismissing said suit for want

> of jurisdiction of the defendant, be and the same is hereby allowed and awarded upon said petition of the plaintiff, solely upon the question of the jurisdiction of the Court, as prayed for in said petition, *to review the question of jurisdiction of the court in said petition mentioned, which is the only question arising herein.*"

It would be difficult to cover the jurisdictional question in a case with any more complete certificate than is contained in the papers mentioned and quoted from in the first point of our first brief.

In the case of *Excelsior Wooden Pipe Company vs. Pacific Bridge Company*, 185 U. S., 282, 285, this court said, at page 285:

> "This decree, after reciting 'that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction.' An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed 'from the final order and decree dismissing said suit for want of jurisdiction.' This is clearly a sufficient certificate of the Circuit Court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of that court."

In re Lehigh Mining and Manufacturing Company, Petitioner, 156 U. S., 322, 325, 327, the following was the order allowing the writ of error:

> "'The plaintiff, considering itself aggrieved by the rulings of said court in the said case, in which final judgment was rendered at the May term, 1894, to-wit., on May 30, 1894,

of said Circuit Court held at this place, dismissing the said case because the said court, in its opinion, did not have jurisdiction thereof, and having on the 30th day of May, 1894, filed its bill of exceptions, and having on this day filed an assignment of errors and its petition praying for a writ of error to said judgment and proceedings to the Supreme Court of the United States, and that a full transcript of the record and proceedings in said cause, duly authenticated, be sent to said Supreme Court.

'Now on this day, to-wit., May 30, 1894, it is ordered and considered by this court that said writ of error be allowed and awarded as prayed for, * * *'."

This was held to be a sufficient certificate.

In the opinion the Court said:

"The question involved was only the question of jurisdiction, and the judgment not only recited that for reasons in writing, filed as part of the order, the court considered that it had no jurisdiction of the case, and therefore dismissed it for want of jurisdiction; but the District Judge certified in the bill of exceptions that it was 'held that the court did not have jurisdiction of the suit, and ordered the same to be dismissed'; and, in the order allowing the writ of error, certified in effect that it was allowed 'upon the question of jurisdiction'."

In *Huntington vs. Laidley*, 176 U. S., 668, 673, 674, 675, 676 and 677, the Court said, on page 676:

"In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways:

by the terms of the decree appealed from and of the order allowing the appeal; or by a separate certificate of the court below."

After citing authorities, the Court then refers to the recitals in the decree, and says, on page 677:

> "The final decree, therefore, clearly shows that the question decided below was a specific question of jurisdiction only. This dismissal of the suit for want of jurisdiction was the only ground assigned for the appeal; and the appeal was allowed 'as prayed for'."

In *Interior Construction and Improvement Company vs. Gibney*, 160 U. S., 217, 219, the Court said, at page 219:

> "The record shows that the only question tried and decided in the Circuit Court was a demurrer to the plea to the jurisdiction; and the petition, upon which the writ of error was allowed, asked only for the review of the judgment that the court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified to this court, as required by the act of March 3, 1891, c. 517; Sec. 5, 26 Stat., 828."

In *Shields vs. Coleman*, 157 U. S., 168, 175, 176, the Court said, on pages 176 and 177:

> "But under the authority of *United States vs. Jahn*, 155 U. S., 109, and *In re Lehigh Company*, 156 U. S., 322, the statement in the last order quoted from the record taken in connection with the petition upon which it was founded must be held to be a sufficient certificate. It is not necessary that the word 'certify' be formally used. It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated."

The judgment, bill of exceptions, petition for writ of error and order allowing the writ of error in this case, clearly bring it within the above authorities, and under these authorities the question concerning the jurisdiction of the court has been sufficiently certified to this court.

IV.

The burden of the argument in the brief for the defendant in error on the question concerning the time when the petition for removal should be filed, is to the effect that the time for filing such petition had not expired, or even commenced to run, because the complaint had not been served. If this is a good argument, the time for a defendant to file a petition in a case, where the complaint was not served with the summons, never expires or commences to run, in case the defendant fails to demand a copy of the complaint, although the time for entering judgment has arrived and judgment may have been entered and, although there be no question whatever concerning the legality of the service of the summons. The legality of the service of the summons in this case has been established by the order of the state court denying the defendant's motion to set aside the service of the summons, which order was made by a court having jurisdiction to render it. The brief for the defendant in error does not attempt to explain why the defendant failed to demand a copy of the complaint, although we have shown, on pages 54, 55, 56, 57 and 58, of our first brief that under Sections 421 and 479 of the Code of Civil Procedure of the State of New York, as construed by the courts of that state, the defendant

could have demanded a copy of the complaint within twenty days after the service of the summons, without making an appearance in the case, the statute being evidently framed with just such a case as the one at bar in view, and to put a defendant who is served with a summons without a complaint in exactly the same position with the same privileges and advantages, as if the complaint had been served with the summons. The counsel for the defendant in error has not attempted to answer that part of our argument contained on the pages above mentioned.

Respectfully submitted,

JAMES G. FLANDERS,

Of Counel for Plaintiff in Error.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

HIRAM REMINGTON,
Plaintiff in Error,
vs.
CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

STATE OF WISCONSIN, } ss.
MILWAUKEE COUNTY, }

FREDERICK H. REMINGTON, being first duly sworn, deposes and says that he is an attorney and counselor-at-law, duly admitted to practice in the courts of the State of New York and in the courts of the State of Wisconsin. That he has been one of the counsel for the plaintiff in error in the above entitled action since its commencement in the Supreme Court of the State of New York. That the statement hereinafter set forth and contained in "Memorandum in Opposition to Motion to Advance Case unless Oral Argument is Allowed," signed by Mr. Maxwell Evarts, of counsel for the defendant in error, and submitted to this court on the 20th day of February, 1905, in the above entitled case, is misleading and should be corrected. That the statement referred to is the following, on page 2 of said memorandum:

> "The bill of exceptions was presented to and signed by the judge, without any notice to the defendant in error of such presentation. If notice of such presentation had been given, the bill of exceptions would have been very different and easier to understand."

Affiant prepared the said bill of exceptions and sent the same, with a notice stating that the plaintiff in said action proposed said bill of exceptions, to the firm of Brown, Carlisle & Hugo, plaintiff's attorneys of record in said action, residing at Watertown, New York, for the purpose of having the same served upon the firm of Purcell, Walker & Burns, the attorneys of record for said defendant in said action. That the said proposed bill of exceptions, with said notice, was served upon said firm of Purcell, Walker & Burns on the 2nd day of September, 1904, as appears by the annexed affidavit of John N. Carlisle, verified the 8th day of September, 1904; that on the 13th day of September, 1904, no amendments to said bill of exceptions had been served and no paper relating to said bill of exceptions had been served by the defendant's attorneys, as appears by the annexed affidavit of said John N. Carlisle, verified the 13th day of September, 1904. That upon receiving the said affidavits from said John N. Carlisle, and on the 15th day of September, 1904, affiant mailed the said proposed bill of exceptions, said notice and said affidavits, together with a letter signed by Mr. James G. Flanders, who was also of counsel for the plaintiff in said action, to Hon. George W. Ray, district judge of the United States for the Northern District of New York, at Norwich, New York, and that the annexed letter, dated September 15th, 1904, is a copy of the said letter so mailed to said judge. That in due course of mail said bill of exceptions was duly returned by the said judge, signed by him, and affiant thereupon caused the same to be filed in the office of the clerk of the Circuit Court of the United States for the Northern District of New York. That affiant did not file the said two affidavits of said John N. Carlisle and the said notice proposing the said bill of exceptions, for the reason that they were not part of the record in the case and were simply necessary for the purpose of informing Judge Ray that the rule of the court had been complied with and the time for serving the amendments to the proposed bill of exceptions had elapsed, and no amendments had been served. That the said presentation of

said bill of exceptions to the said judge, for his signature, was in strict accordance with the rule of the court. That the fifth rule of said Circuit Court of the United States for the Northern District of New York, taken from a printed pamphlet entitled "Rules of the Circuit Court of the United States for the Northern District of New York," received by affiant from the clerk of said Circuit Court on the 10th day of November, 1903, is as follows:

> "Rule V. In cases not provided for by the rules of this court, the rules of the District Court for the Northern District of New York, so far as the same are in their nature applicable, are to be considered as rules of this court."

That included in the same pamphlet are nine rules of the district court which are stated in said pamphlet to be applicable to Circuit Court practice as provided by said circuit rule 5; that Rule 83 of said district rules is one of said nine rules so included in said pamphlet, and reads as follows:

> "Rule LXXXIII. In all cases not provided for by the rules of this court, or by law, the practice of the Supreme Court of this state, as prescribed by the Revised Statutes of this state, and by the rules of the said court, shall regulate the practice of this court, so far as the same may be applicable."

That neither said Circuit Court rules nor said district court rules provide a method for proposing and settling cases or bills of exceptions and such proposal and settlement is therefore regulated under said last mentioned rule, by the rules of the Supreme Court of the State of New York. That attached hereto, marked "Exhibit A," are Rules 32, 33, 34 and 35, of the Supreme Court rules of the State of New York, adopted in convention of the justices of the Supreme Court assigned to the appellate division thereof, held at Albany December 4th, 1895, pursuant to Code of Civil Procedure, Section 17, amended October 24, 1899. That these rules are taken from a printed copy of said rules, in affiant's possession, and that said rules, a copy of

which is hereto attached, marked "Exhibit A," are the only rules contained in said Supreme Court rules of the State of New York, relating to cases and bills of exceptions and settlement of the same. That Rule 32 of said Supreme Court rules provides that whenever it shall be necessary to make a case or a case and exceptions, or a case containing exceptions, the same shall be made and a copy thereof served on the opposite party, and that the party served, within ten days thereafter, may propose amendments thereto and serve a copy on the party proposing a case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments, will be submitted for settlement at a time and place to be specified in the notice. Rule 33 of said Supreme Court of the State of New York reads as follows:

> "Rule XXXIII. Failure to Make a Case. If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments and the other to notify an appearance before the judge, or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed."

FREDERICK H. REMINGTON.

Subscribed and sworn to before me this 24th day of February, 1905.

FRED A. FOSTER,
Notary Public,
Milwaukee County, Wisconsin.

My commission expires June 18, 1905.
(Notarial Seal.)

(Certificate of Clerk of Circuit Court, Milwaukee County, Wis., attached.)

SUPREME COURT OF THE UNITED STATES.

HIRAM REMINGTON,
Plaintiff in Error,
vs.
CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

STATE OF WISCONSIN, } ss.
MILWAUKEE COUNTY, }

JAMES G. FLANDERS, being first duly sworn, says:

I am counsel for the plaintiff in error in the above entitled case in this court, and the counsel for said plaintiff when said case was in the Circuit Court of the United States for the Northern District of New York. On the 15th day of September, 1904, I signed a letter dated September 15, 1904, of which the annexed is a copy and caused the same to be mailed, with the proposed bill of exceptions and the affidavits of John N. Carlisle therein mentioned, to Hon. George W. Ray, district judge of the United States for the Northern District of New York, at Norwich, New York. That the said original affidavits of said John N. Carlisle are hereto attached and are verified respectively the 8th day of September, 1904, and the 13th day of September, 1904.

JAMES G. FLANDERS.

Subscribed and sworn to before me this 24th day of February, 1905.

FRED A. FOSTER,
Notary Public,
Milwaukee County, Wisconsin.

My commission expires June 18, 1905.
(Notarial Seal.)

(Certificate of Clerk of Circuit Court, Milwaukee County, Wis., attached.)

WINKLER, FLANDERS, SMITH, BOTTUM & VILAS,

COUNSELORS-AT-LAW,

MILWAUKEE, Wis., Sept. 15, 1904.

HON. GEORGE W. RAY,

United States Judge,

Norwich, N. Y.

DEAR SIR:—In the case of Hiram Remington vs. Central Pacific Railroad Company, the judgment dismissing the action for want of jurisdiction of the defendant, was entered August 30, 1904. On the 2nd day of September, the plaintiff's proposed bill of exceptions was served upon the defendant's attorneys. The ten days allowed by the rule for proposing amendments have expired, and the time for proposing amendments has not been extended and no amendments have been served, as appears from the annexed affidavits of John N. Carlisle attached to the bill of exceptions. Will you kindly sign the certificate at the end of the bill and return the bill of exceptions to us?

I am informed that you will hold court in Utica on September 20th. Will the session of court at that time probably be short or will it last several days? I inquire for the reason that I desire to know where to send the papers for the purpose of getting the necessary order for the issuing of the writ of error in the case.

Yours very truly,

(Signed) JAMES G. FLANDERS.

CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF NEW YORK.

HIRAM REMINGTON,
Plaintiff,

vs.

CENTRAL PACIFIC RAILROAD COMPANY,
Defendant.

STATE OF NEW YORK, JEFFERSON COUNTY, } ss.

JOHN N. CARLISLE, being duly sworn, says that he resides at the City of Watertown, New York, and is a member of the firm of Brown, Carlisle & Hugo, who are attorneys for the plaintiff in the above entitled action; that on the 2nd day of September, 1904, he personally served the annexed proposed bill of exceptions and the notice thereto annexed, in the above entitled action, upon the firm of Purcell, Walker & Burns, who are attorneys for the defendant in said action, by delivering to and leaving with Henry Purcell, a member of said firm, at the office of said firm of Purcell, Walker & Burns, at the City of Watertown, Jefferson County, New York, a true copy of said bill of exceptions and notice; and that the deponent then personally knew the said Henry Purcell to be a member of said firm and one of the attorneys of record for the defendant in said action; that the said defendant's attorneys retained the said copy of said bill of exceptions and notice and have not returned the same.

JOHN N. CARLISLE.

Subscribed and sworn to before me this 8th day of September, A. D., 1904.

MASON A. SWAN,
Notary Public,
Jefferson County, New York.

(Notarial Seal.)

IN CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

HIRAM REMINGTON,
Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY,
Defendant.

STATE OF NEW YORK, JEFFERSON COUNTY, } ss.

JOHN N. CARLISLE, being duly sworn, deposes and says that he resides at the City of Watertown, N. Y., and is one of the attorneys of record of the plaintiff named in the above entitled action.

Deponent further says that he personally served the bill of exceptions on behalf of the plaintiff in this action upon Henry Purcell, one of the attorneys for the defendant on the 2nd day of September, 1904; that since that time no amendments to said bill of exceptions have been served; that the time for serving the amendments has expired and has not been extended in any way; that the bill of exceptions has not been returned by defendant's attorneys and no paper relating to said bill of exceptions has been served by defendant's attorneys upon the law firm of Brown, Carlisle & Hugo, of which deponent is a member.

JOHN N. CARLISLE.

Sworn to before me this 13th day of September, 1904.

JNO. CONBOY,
Notary Public.

(Notarial Seal.)

EXHIBIT "A".

Rule XXXII.

CASES, EXCEPTIONS, WHEN SERVED; AMENDMENTS; SETTLEMENT, ETC.

Whenever it shall be necessary to make a case, or a case and exceptions, or a case containing exceptions, the same shall be made, and a copy thereof served on the opposite party within the following times:

If the trial was before the court or referee, including trials by a jury of one or more specific questions of fact in an action triable by the court, within thirty days after service of a copy of the decision or report and of written notice of the entry of the judgment thereon.

In the Surrogate's Court, within thirty days after service of a copy of the decree or order and notice of the entry thereof.

If the trial were before a jury within thirty days after notice of the decision of a motion for a new trial, if such motion be made and be not decided at the time of the trial, or within thirty days after service of a copy of the judgment and notice of its entry.

The party served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing a case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted for settlement at a time and place to be specified in the notice, to the judge or referee before whom the cause was tried.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the judge or referee for settlement, mark upon the several amendments his allowance or disallowance thereof, and shall also plainly mark thereon and upon the stenographer's minutes the parts to which the proposed amendments are applicable, together with the

number of the amendment. If the party proposing the amendments claims that the case should be made to conform to the minutes of the stenographer he must refer at the end of each amendment to the proper page of such minutes. The judge or referee shall thereupon correct and settle the case. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than ten days after the service of such notice. The lines of the case shall be so numbered that each copy shall correspond. The surrogate, on appeal from his court, may by order allow further time for the doing of any of the acts above provided to be done on such appeals.

Cases reserved for argument and special verdicts shall be settled in the same manner. The parties may agree on the facts proven to be inserted in the case, instead of the testimony on the approval of the judge.

No order extending the time to serve a case, or a case containing exceptions, or the time within which amendments thereto may be served, shall be made unless the party applying for such order serve a notice of two days upon the adverse parties of his intention to apply therefor, stating the time and place for making such applications. (As amended October 24, 1899.)

Rule XXXIII.

Failure to make a case.

If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the judge, or referee, they shall respectively be deemed, the former to have agreed to the case as proposed and the latter to have agreed to the amendments as proposed.

Rule XXXIV.

CASE AND BILL OF EXCEPTIONS; CONTENTS; RESETTLEMENT; EXHIBITS.

A bill of exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which exceptions were taken on the trial; and it shall be the duty of the judge upon settlement to strike out all the evidence and other matters which shall not have been necessarily inserted.

A case or exceptions shall not contain the evidence in *hæc verba*, or by question and answer, unless ordered by the judge or referee by or before whom the same shall be settled. But the facts of the case, together with the rulings on the trial, shall be stated in a narrative form, except that where it is claimed by either party that any particular testimony should be given in *hæc verba*, the judge or referee who settles the case shall determine whether or not a proper presentation of the case for review requires such portion of the evidence to be so stated in *hæc verba*, whereupon the case shall be made accordingly.

If any case or bill of exceptions does not conform to this rule, the court before which the same shall be brought for review may order the same back for resettlement.

Exhibits shall not be printed at length unless the judge or referee so direct.

Where, upon non-enumerated motions, voluminous documents have been used which are material only as to the fact of their existence, or as to a small part of their contents, the parties may, by stipulation, or the court or judge below may, upon notice, settle a statement respecting the same, or the parts thereof to be returned upon the appeal from the order to be used in place of the original documents.

Rule XXXV.

Case to be signed; service of copy.

When a party makes a case, or a case and exceptions, he shall procure the same to be signed by the judge or referee, and filed within ten days after it shall have been settled, or it shall be deemed abandoned, unless the time is extended by order.